ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION No. 1
(December 18, 1991)

APPLICATION FOR AND ACCEPTANCE OF FUTURE EMPLOYMENT BY JUDICIAL LAW CLERKS[*]

Law clerks for judges of the District of Columbia Court of Appeals (DCCA) and for judges and hearing commissioners of the Superior Court frequently apply for positions with prospective employers, including in particular the United States Attorney's Office and other institutional litigants who appear before the District of Columbia courts. The Joint Committee on Judicial Administration has asked our Committee to formulate guidelines addressing the circumstances under which a law clerk must be disqualified from working on a case in which his or her prospective employer is a party, counsel, or *amicus curiae.*

Canon 3(C)(1) of the Code of Judicial Conduct provides that a judge should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be

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[*] For the purposes of this opinion, the term law clerk includes a law student who serves as an intern.

questioned. *See also Scott v. United States*, 559 A.2d 745, 748-51 (D.C. 1989) (en banc). The law clerk has been described as "the judge's right hand, [with] an important role in the decision-making process and in shaping [the judge's] ultimate decision." VIRGINIA STATE BAR, STANDING COMMITTEE ON LEGAL ETHICS, *Opinion #1334* (April 20, 1990) (quoting ABA Informal Opinion 1092). Moreover, there is a "public perception that judges discuss confidentially with their clerks the underlying rationale of [their decisions]." *Opinion #1334, supra*. In light of these considerations, judges have an obligation to exercise sensitivity and prudence in dealing with actual or apparent conflicts of interest on the part of their law clerks.

At the same time, compelling practical considerations counsel against excessive restrictions in this area, particularly where the law clerk's prospective employer is a high-volume litigator before the courts of this jurisdiction. In the District of Columbia, three such employers -- the United States Attorney, the Corporation Counsel, and the Public Defender Service -- cumulatively account for a very substantial percentage of the litigation before our courts. Each Superior Court judge has only one law clerk and, while each active judge of the DCCA has two, senior judges and hearing commissioners share law clerks

with their colleagues. Under these circumstances, the disqualification of a law clerk from so great a part of a judicial officer's caseload would be extremely burdensome.

Moreover, although there are some circumstances in which the criteria which are applied to judges in determining whether there is an appearance of impropriety may also be applied to law clerks, *see Kennedy v. Great Atlantic & Pacific Tea Co., Inc.,* 551 F.2d 593, 596 (5th Cir. 1977), there are obvious differences in the two positions which would make it unreasonable to treat them identically for all purposes. A law firm is not disqualified from a matter solely because a single attorney in the firm previously considered that matter in his or her capacity as a judicial law clerk; the firm would, of course, be disqualified if the lawyer had participated as a judge. *See* DISTRICT OF COLUMBIA COURT OF APPEALS RULES OF PROFESSIONAL CONDUCT, Rule 1.11 (b)(1991). In the final analysis, it is judges and not law clerks who decide cases, and disqualification should be avoided if more modest measures, *e.g.* rigorous supervision of the law clerk's work, will effectively avoid both impropriety and the appearance thereof.

Our Committee has surveyed available Advisory Opinions on this subject and has been in contact with our counterparts in several other jurisdictions. Surprisingly,

there appears to be comparatively little applicable precedent, although the Committee on Codes of Conduct of the Judicial Conference of the United States has twice addressed issues relevant to our inquiry.

In *Advisory Opinion No. 74* (Oct. 26, 1984), the federal Committee concluded that if an offer of employment has been extended to the law clerk and has been or may be accepted, then, in order to avoid the appearance of impropriety, the law clerk is to have "no involvement whatsoever in pending matters handled by the prospective employer." In *Advisory Opinion No.* 81 (Sept. 14, 1987), the federal Committee applied essentially the same rule where the prospective employer was the United States Attorney. Observing that participation of the law clerk in a pending case "may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel," the Committee stated that "[t]he judge should isolate the law clerk from cases in which the United States Attorney's Office appears."

This federal approach is not universally followed.[1] Our Committee was informally advised by a representative of

[1] Interestingly, the federal Committee expressed the view in *Advisory Opinion No. 38* (Aug. 1, 1974) that a judge whose son had accepted a position with the United States Attorney's Office was not disqualified from hearing cases in which that Office was representing the United States. The Committee emphasized that the United States Attorney's Office is not a

the Advisory Committee on Extra-Judicial Activities in an eastern State that, in contrast with federal *Advisory Opinion No. 81*, that State's judges treat a law clerk's prospective employment with the prosecutor or public defender differently from the clerk's potential association with a law firm. There is an absolute prohibition against assigning a law clerk to work on any matter handled by a firm from which the clerk has received and has accepted, or may accept, an offer of employment. That policy does not apply, however, to proffered employment by the prosecutor or the public defender. According to the State Committee, there has to be "a balancing of the damage to the judges' public image with the need to administer justice," and practical considerations have apparently prevailed.

In light of the considerations discussed above, our Committee has drafted guidelines which largely speak for themselves. Our Committee wishes to invite the reader's attention to three specific areas in which more than one alternative was considered, and to explain the reasons for our Committee's choice.

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law firm, that it represents the public interest, and that under these circumstances it would be unreasonable to question the judge's impartiality.

1. The event precipitating precautionary measures.

In *Advisory Opinion No.* 74, *supra*, as we have noted, the federal Committee concluded that the need for disqualification arises "whenever an offer of employment has been extended to the law clerk and either has been, or may be, accepted by the law clerk." The federal Committee was of the opinion that "the occasion for these precautionary measures does not arise merely because the law clerk has submitted an application for employment," but recognized that in some cases "the judge may feel it advisable to take these precautionary measures even at a preliminary stage of the employment discussions."

Any incentive on the part of the law clerk to attempt to act favorably towards the prospective employer might reasonably be viewed as being at least as strong during active negotiations for employment as it would be after an offer has been made and accepted. Accordingly, our Committee determined that the precipitating event should be an offer of an employment interview or an offer of employment, whichever comes first.

2. Treatment of high-volume litigators.

As noted in the preceding discussion, the federal Committee treats the United States Attorney's Office (and

presumably other high-volume litigators) as indistinguishable from a prospective private employer for purposes of law clerk disqualification. The eastern State as to which we received information, on the other hand, follows a less exacting approach. There is also some recognition in the case law that, for purposes of judicial disqualification, the United States Attorney's Office is not a conventional law firm. *United States v. Zagari*, 419 F. Supp. 494, 505 (N.D. Cal. 1976); *Scott, supra*, 559 A.2d. at 764 n.7 (concurring opinion); *see also Advisory Opinion No. 38, cited supra* note 1.

Because the federal policy would impose a very heavy burden on the District's judicial officers, and because less drastic measures will in our view achieve both impartiality in fact and the appearance thereof, our Committee has proposed that we adhere to the more moderate approach which is utilized in the eastern State. We emphasize, however, that if this policy is adopted, each judge will have the obligation to become and remain apprised of his or her law clerk's job search activities, and to remove the law clerk from any case in which there is reason to believe that the clerk's impartiality, in any measure, has been or may be compromised or impaired.

3. Selection of litigators eligible for the "high volume" exception.

Our Committee considered including in the exception for high volume litigators other public or quasi-public agencies (*e.g.* the Legal Aid Society, Neighborhood Legal Services, other federal or District of Columbia agencies, Bar Counsel, etc.), as well as private law firms which engage in a high volume of litigation before the District of Columbia courts. We determined to exclude, all but the identified institutional litigants, concluding that application of the basic disqualification rule to all other prospective employers would not sufficiently impair the work of the District of Columbia courts to warrant any further exception. The proposal to exempt the United States Attorney, the Corporation Counsel, and the Public Defender Service was in substantial part based on a virtual "rule of necessity" which is simply not applicable to other agencies or employers, public or private.

GUIDELINES*
(December 18, 1991)

A. General Considerations

1. During the clerkship, a judicial law clerk may seek and obtain employment to commence after the completion of the clerkship, provided that the clerk and the judge abide by the restrictions set forth below. The purpose of these restrictions is to maintain the impartiality of the court and to avoid any appearance of impropriety.

2. A law clerk has an obligation to apprise the judge that he or she is seeking future employment and to inform the judge of the identities of prospective employers, as further described in section (B) (1) of this policy.

3. A judge has an obligation to ensure that the law clerk's interactions with prospective employers do not affect the impartiality of the court and do not create an appearance of impropriety. The judge is required to become and remain informed regarding the clerk's job search, to supervise the work of the law clerk and, if necessary, to exclude the clerk from matters involving prospective employers, as described in sections (B), (C), and (D) of this Policy.

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* These guidelines apply to law clerks for judges of the District of Columbia Court of Appeals, for judges of the Superior Court of the District of Columbia, and for Hearing Commissioners.

B. When Policy Applies

1. No obligation to notify the judge or to take other precautionary measures arises merely because the law clerk has submitted an application for employment, or because a prospective employer has requested additional written information from the clerk. The clerk's obligation to inform the judge of the identity of a prospective employer arises when that prospective employer notifies the clerk that the clerk has been invited to an employment interview, or has been offered a position without an interview being required, provided, however, that no obligation to inform the judge or to take other precautionary measures arises if the clerk has declined the interview or rejected the offer. The clerk is required to inform the judge of the identity of a prospective employer only if that prospective employer has or may have a matter pending before the judge.

2. The judge's responsibilities pursuant to these guidelines arise when the judge knows or should know that the clerk has been invited to an interview by a prospective employer and has not declined the invitation, or that the clerk has received an offer of employment which the clerk has not rejected.

C. General Disqualification

Except as provided in Part D, when a law clerk has been invited to an employment interview, or has been offered future employment by a prospective employer and the clerk has not declined the interview or rejected the offer of employment, the law clerk shall be excluded from working on any matters pending before the judge in which the prospective employer is a party, counsel, or *amicus curiae.*

D. Exception for High Volume Litigators

The general disqualification in Part C shall not apply where the law clerk has applied for or secured employment with the United States Attorney for the District of Columbia, the Corporation Counsel, or the Public Defender Service. Where employment has been sought or secured with any of these three agencies, the law clerk may, in the judge's discretion, continue to work on cases in which this prospective employer is a party, counsel or *amicus curiae,* provided, however, that the judge shall closely supervise the clerk and scrutinize the clerk's work product to ensure that no conscious or unconscious bias on the part of the clerk has affected or may impair the impartiality of the court.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION No. 2
(April 23, 1992)

DISQUALIFICATI0N OF JUDGE BECAUSE OF PAST EMPLOYMENT BY LAW ENFORCEMENT AGENCIES AND SPOUSE'S PRESENT AFFILIATI0N WITH MFTR0POLITAN POLICE DEPARTMENT

A judge of the Superior Court has requested a formal advisory opinion addressing disqualification issues which have been raised, and which she expects to be raised in the future, as a result of her past and present association with government agencies, specifically the Metropolitan Police Department (MPD) and the Office of the United States Attorney. In particular, before being appointed to the Superior Court of the District of Columbia, the judge served as a police officer with the MPD for six and a half years, achieving the rank of sergeant; she then served as an Assistant United States Attorney for the District of Columbia for sixteen years, for much of that time prosecuting criminal cases. Her husband is presently a Deputy Chief of Police with the MPD. A salaried employee, he has been the Commanding Officer of the First District, one of seven patrol districts in the city, since February 1988. His responsibilities, as described in documents submitted to us, are

set forth in the margin.[1] We are told that, although his duties include disciplining personnel and monitoring crime trends in the First District, he rarely becomes involved personally in, or acquires knowledge of, individual cases. He has not testified regularly in court for more than fifteen years.[2]

The judge has posed a series of questions which focused on her assignment at the time to juvenile delinquency cases in the Family Division and likely future assignments involving criminal cases in particular. These questions can be summarized as follows:

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[1] As set forth in the police General Order which the judge has furnished us, the duties and responsibilities of a Deputy Chief of Police consist of the following:

> a. Perform such duties as may be assigned by the Chief of Police, and establish and maintain such records of a police nature as may be directed by the Mayor or Chief of Police.
>
> b. Assure that the laws and regulations governing the department are properly observed and enforced and that discipline is maintained.
>
> c. Advise the Chief of Police concerning all matters of importance and apprise him of conditions in the organizational elements under their command.
>
> d. Review and forward to the Chief of Police all special reports and requests submitted by the organizational elements under their command.
>
> e. Be responsible for complying with the provisions of departmental directives relative to their position.

[2] Our opinion is predicated upon these representations as to the spouse's position and responsibilities. We necessarily offer no opinion about ethical

1. Because of her own prior experience as a police officer and a criminal prosecutor, should the judge recuse herself from any case in which the conduct or credibility of law enforcement officers may be an issue? More particularly, should the judge disqualify herself from any case involving a charge of assault on a police officer?

2. Because of her spousal relationship, should the judge recuse herself from any case

a. in which an MPD officer is expected to be a witness;

b. in which an officer assigned to the First District is expected to be a witness; or

c. which involves a criminal charge of assault on a police officer?

In each such case involving a police officer as potential witness or victim, the judge has in mind situations where neither she nor any family member is acquainted personally with the officer. Where such acquaintanceship exists, the judge apparently intends to recuse herself automatically.[3]

We first set forth the general ethical principles that govern our inquiry. They are contained, in the first instance,

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issues that might arise were his duties and relationships to officers under his command different than as described to us.

[3] We accordingly express no opinion whether recusal in such circumstances would be ethically required.

in the ABA Code of Judicial Conduct (1972, as amended in 1982 and 1984) (hereafter 1972 Code). However, because this Committee currently has under consideration whether to recommend adoption, in whole or in part, of the ABA Model Code of Judicial Conduct (1990) (hereafter 1990 Code), we shall also set forth the standards contained in that Code.

A.

Canon 2 of the 1972 Code provides that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities."[4] The equal emphasis in this language upon "the appearance of impropriety" demonstrates that the standard of conduct is an objective one: Would a reasonable person knowing all the circumstances question the judge's impartiality? *E.g.,* L. Abramson, *Judicial Disqualification under Canon 3C of the Code of Judicial Conduct* 16 (1986) (quoting E. Thode, *Reporter's Notes of Code of Judicial Conduct* 60 (1973)); *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 860-61 (1988); *id.* at 871, 872 (Rehnquist, C.J., dissenting); *Scott v. United States,* 559 A.2d 745, 749 (D.C. 1989).[5]

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[4] The 1990 Code makes all pronoun references gender-neutral.

[5] Our court of appeals has had several occasions recently to apply the standard of "the appearance of impropriety" to conduct of individual judges. *In re J.A.,* No. 89-1352 (D.C. December 20, 1991); *Belton v. United States,* 581 A.2d 1205 (D.C. 1990); *Scott v. United States, supra; Turman v. United States,* 555 A.2d 1037 (D.C. 1989) (per curiam). The court has consistently applied an "objective" test for evaluating appearances by emphasizing that the inquiry is how "'the average person,' a fully informed person," or an "objective observer" would view the situation. *Scott,* 559 A.2d at 750, 754; *Belton,* 581 A.2d at 1214 ("a hypothetical

More particularly, 1972 Canon 2B provides that "[a] judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment." Canon 3 provides broadly that "[a] judge should perform the duties of his office impartially and diligently," then sets forth (in section C, "Disqualification") specific instances in which "[a] judge should disqualify himself" because "his impartiality might reasonably be questioned." As relevant to our present inquiry, Canon 3C provides:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > * * * *
> >
> > (c) he knows that he ... or his spouse... as a financial interest in the subject matter in controversy or in a party to the

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objective observer"). Hence, although individual litigants -- including criminal defendants -- who appear before the judge are certainly among the class of those who perceptions provide the benchmark for judging appearances, there is no basis for creation of a sub-class of reasonable person or objective observer defined -- for example -- as "objective" defendants in criminal cases. The "hypothetical objective observer" standard necessarily means that we factor out those subjective perceptions particular to parties before the judge about the fairness of the proceedings and partiality of the tribunal.

> proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (d) he or his spouse
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> * * * *
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding....[6]

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[6] Canon 3E of the 1990 Code similarly provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * * *
>
> (c) the judge knows that he or she ...or the judge's spouse ... has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;
>
> (d) the judge or the judge's spouse...
>
> (i) is a party to the proceeding, or an officer, director or trustee of a party;

B.

We begin by observing that if the judge, as a result either of her own previous employment or of her husband's employment, has personal knowledge of disputed evidentiary facts concerning a proceeding to which she is assigned, she must disqualify herself. 1972 Canon 3C (1) (a). By its owns terms, this requirement does not extend to personal knowledge which the judge's *spouse*, by virtue of his office, has acquired but which he has not conveyed to the judge; in that instance, the judge could have no basis on which to know whether recusal was required or not required under this canon. The question may be asked, however, whether the judge is obliged to inquire of her spouse whether he has personal knowledge of disputed evidentiary facts concerning a proceeding assigned to her. We think the answer to this question is no, for two reasons. First, the judge has explained to us that her spouse, because of the level of his

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> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

This advisory opinion does not require us to express any view as to differences in meaning between an "interest" (1972 Code) and a "de minimis interest" (1990 Code) in the subject in controversy.

supervisory position, rarely becomes involved in individual cases or acquires personal knowledge of them. In the vast majority of cases, therefore, a duty on the judge's part to inquire whether he possesses such knowledge would likely yield nothing. Second, we think a reasonable person, knowing the spouse's position as a senior police official, would assume that the spouse would exercise great circumspection in discussing with the judge his knowledge of cases that possibly might come before her, precisely to avoid disqualifications burdensome to the court. In sum, we do not believe that a reasonable person, knowing all the circumstances, would impute to the judge personally any knowledge that her spouse might have of facts concerning a proceeding assigned to her. Therefore, she is under no obligation routinely to inquire of her husband whether he has such knowledge.

C.

We inquire next whether the judge's spouse should be regarded as "an officer" of a "party" in any case in which the District of Columbia is a party to the proceeding, hence requiring her disqualification under 1972 Canon 3C (1) (d) (i). This issue may arise in regard to Family Division petitions *(e.g.,* juvenile petitions alleging delinquency) and certain criminal prosecutions brought by the District of Columbia, as well as in civil proceedings in which the District of Columbia is a party. Canon 3C (1) (d) (i) equates a party with "an officer, director

or trustee of a party." From this language, it might be thought that the drafters had in mind an "officer" of a private or commercial entity, but there is authority that officials of governmental agencies are "officers" within the meaning of this canon. *E.g., Ethics Opinion of the Committee of the Kentucky Judiciary* JE- 80; *Ethics Opinion of the Ethics Advisory Committee of the State of Washington,* 8401; *see Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers of the Trainable Retarded,* 351 N.E.2d 777 (Ohio App. 1975). We shall assume this is so.

Nevertheless, we do not believe that this canon, by itself, requires the judge's disqualification in any case in which the District of Columbia is a party. The judge's spouse is a salaried Deputy Chief of the Metropolitan Police Department; as such he is an "officer" of the police department, although a high-level officer whose responsibilities involve departmental policy-making. The MPD itself is not a "party" in proceedings in the Superior Court; it is a department of the District of Columbia government. In our view, the link between the office and responsibilities of the judge's spouse and the District's role as party in a proceeding is not close enough to deem him an officer of a party within the meaning of the canon.[7] We believe,

[7] See, by contrast, *Ethical Opinion of the Alabama Judicial lnquiry Commission 88-342* (Canon 3C (1)(d)(i) requires disqualification of judge from any proceeding in which city is party either as prosecutor or party to civil case, where judge's brother-in-law is member of city council, "the governing body of the city").

instead, that more discriminating answers to whether the judge's impartiality might reasonably be questioned can be furnished by inquiring -- under 1972 Canons 3C (1) (c) and (d) (iii) -- whether the judge knows her spouse "to have an interest that could be substantially affected by the outcome of the proceeding."[8] We turn therefore to that inquiry.

D.

Applying the standard of "an interest that could be substantially affected" to the questions posed by the judge, we conclude that the judge is under no categorical obligation to disqualify herself from a case in which MPD officers testify. From the fact alone that police officers testify in a proceeding we do not think that, as a general rule, a reasonable person would impute to the judge's spouse an interest that could be substantially affected by the outcome of the proceeding. It is of course true, as Justice Jackson remarked many years ago, that police officers are "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). Hence it may be assumed that the judge's spouse, as a high-level police official, has an interest in the successful outcome *(i.e.,* a trial leading to conviction) of criminal prosecutions in which guilt is sought to be established by the

[8] The 1990 Code states that "knowledge" or "knows" denotes "actual knowledge of the fact in question," but that "[a] person's knowledge may be inferred from circumstances."

testimony of police officers. He may also be assumed to have an institutional interest in having subordinate police officers be found credible by the trier of fact in criminal cases. But, as a general rule, we do not think a reasonable person would regard this interest as "substantially affected" by the outcome of particular criminal or juvenile proceedings before the judge.

Certainly the spouse, as a salaried governmental official, has no financial interest that would be substantially affected by the outcome of such proceedings. Nor do we believe it can reasonably be asserted that his career advancement would be substantially affected by the outcome of the limited number of proceedings involving police testimony over which the judge may be expected to preside. As indicated, we are told that the spouse's duties include monitoring crime trends and disciplining personnel under his command; his job description, note 1, *supra*, includes "[a]dvis[ing] the Chief of Police concerning all matters of importance and appris[ing] him of conditions in the organizational elements under [the spouse's] command." As a general matter, it is altogether improbable, in our view, that the spouse's performance of these duties would be substantially affected by the outcome of proceedings, individually or in the aggregate, over which the judge may be expected to preside.

We reach a different conclusion as to the question whether the judge should recuse herself when officers testifying in the

proceeding are assigned to the First District, commanded by the judge's spouse. We are told by the judge that approximately 500 officers are assigned to the First District. Although that is a large organization, we believe a reasonable, objective observer would perceive the relationship between the commander of a division and his officers to be necessarily closer and more personal than his relation to other MPD officers. That is true even though we are told the spouse rarely becomes personally involved in or familiar with individual cases in the District. The very notion of a "commander" would suggest to a reasonable person that the spouse has an interest in the courtroom testimony of the persons he commands -- *i.e.*, ratification of that testimony in the broad run of cases by the trier of fact -- that might be substantially affected by the outcome of proceedings before the judge in which those officers testify.[9] We therefore are of the view that the judge should disqualify herself from

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[9] In saying this, we do not imply in the least that we believe either the judge or her spouse would harbor actual bias in favor of a given result in such cases. The personal knowledge of the character of the judge and her spouse by members of this committee compels precisely the opposite conclusion. We are concerned here, however, with what a hypothetical reasonable person would perceive. Although that person is assumed to have knowledge of all the surrounding circumstance, page 4, *supra*, we could not reasonably extend that concept to include personal knowledge of the judge and her spouse such as committee members possess and which causes us to reject the possibility of actual bias.

any proceeding before her in which a First District officer is scheduled to testify.

E.

The judge further asks whether the answer to the recusal question should be different when the proceeding involves a police officer not merely as a witness, but as a victim or actor in the events at issue in the proceeding. The former instance would include cases involving a charge of assaulting a police officer, about which the judge has specifically asked our opinion. The second would include cases (presumably far more numerous) in which an issue in the proceeding is whether, for example, police officers violated the Fourth or Fifth Amendments in conducting a search and seizure or obtaining a confession from an accused. We believe the distinction previously made controls here as well. The judge should recuse herself in any case in which the conduct of a First District officer is in issue -- in the sense described of either victim or actor. But as to MPD officers generally, the judge is under no general obligation to disqualify herself. In those cases, for reasons already discussed, we do not believe a reasonable person would perceive that the judge's spouse has an interest that would be substantially affected by the outcome of such proceedings conducted before the judge. As explained earlier, of course, in any such case where the judge or her spouse is personally

acquainted with the officer(s) involved, the judge intends to recuse herself. See page 3, *supra.* And whenever the judge has personal knowledge of disputed facts concerning, for example, a particular assault on a police officer, Canon 3C (1) (a) will require her disqualification. See page 7, *supra.* But in our view, the fact alone that conduct involving an MPD officer other than a First District officer as victim or actor is at issue in the proceeding does not justify a conclusion that the judge's spouse has an interest that would be substantially affected by the proceeding.

Nevertheless, there may be circumstances where this general rule would not apply even as to MPD officers generally. If, for example, a criminal proceeding called into question a policy or practice formulated and adopted at the Department or Police District level, then a reasonable person might well conclude that the judge's spouse had an interest that might be affected by resolution of that challenge. Examples (meant to be strictly hypothetical) might be disputes over a general police policy concerning the conduct of "roadblock" stops of motor vehicles for license and registration inspection, or a standard police procedure for video tape-recording (or not recording) statements by criminal suspects in response to police interrogation. When policies and practices such as these are placed directly at issue in proceedings, the judge's relation to a senior police official would require that she seriously consider disqualifying

herself to avoid the appearance of partiality. For similar reasons, the judge may be required to disqualify herself from any civil action against the District of Columbia when the conduct involved is that of police officers and the litigation may concern issues of police training and supervision.[10]

F.

Finally, we address the question of what duties of disqualification the judge may have by virtue of her own past employment as a police officer and an Assistant United States Attorney. We have already noted that if the judge, by virtue of her past employment, has personal knowledge of disputed evidentiary facts concerning a proceeding assigned to her, she must disqualify herself. 1972 Canon 3C (1) (a). Beyond this, there can be no general assumption that the judge "has a personal bias or prejudice concerning a party," *id.*, merely because she was formerly a police officer and a prosecutor. "Mere allegations based on a judge's background are insufficient to suggest partiality toward the parties before [her]." *Gregory v. United States,* 393 A.2d 132, 143 (D.C. 1978). For this reason, we are satisfied that the judge's past employment as a police officer no more commands her general disqualification from cases in which police appear as witnesses (or are involved as actors or

[10] We have no occasion to address here, but merely advert to, the provisions for remittal of disqualification contained in both the 1972 Code and the 1990 Code. *See* 1972 Code, Canon 3D; 1990 Code, Canon 3F. Furthermore, although we do not discuss such situations here, we acknowledge that extraordinary circumstances may arise where the condition calling for the judge's disqualification is not foreseeable and countervailing considerations -- such as avoiding the mistrial of a criminal trial in progress -- may dictate that the judge should not recuse herself.

victims) than does her spouse's present affiliation with the police department. Regarding the judge's recent employment as a prosecuting attorney, 1972 Canon 3C (1)(b) generally requires a judge to disqualify himself from a matter if "he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter...." However, the commentary to this canon states:

> A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

Thus, even as to matters that were pending before the Office of the United states Attorney while the judge was employed there, she must recuse herself only (1) if she served as a lawyer in the matter in controversy, or (2) --broadly -- if her impartiality might reasonably be questioned because of her former association with a lawyer who served as a lawyer concerning the matter.[11]

[11] We note that a number of judges who were formerly prosecutors have found it appropriate not to preside over cases pending in the prosecutor's office while they were employed there. The committee does not mean to disapprove of this practice.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION NO. 3
[June 25, 1992]

WHEN SENIOR JUDGES MAY ACT AS ARBITRATORS

The Advisory Committee on Judicial Conduct has received a request from an Associate Judge of the Superior Court for a formal opinion with respect to whether and under what circumstances a judge who has been appointed as a senior judge pursuant to D.C. Code § 11-504 (1989) and who performs judicial duties may act as a paid arbitrator hired through a private arbitration organization. The judge has also inquired whether the propriety of a senior judge acting as an arbitrator would be affected (1) by whether the arbitration work is done in the District or in another city; (2) by whether the arbitration cases involve matters which might eventually come before Superior Court; (3) by whether the senior judge has judicial matters under advisement at the time he or she acts as an arbitrator or vice-versa; and (4) by whether a senior judge has sat as a judge during the same week or month that he or she acts as a private arbitrator. The Advisory Committee has concluded that a senior judge may act as an arbitrator so long as he or she does not do so at the same time as performing

judicial duties, as discussed below, and so long as the judge acts in accordance with the Canons of Judicial Ethics applicable to retired judges.

Canon 5E of the 1972 American Bar Association Code of Judicial Conduct (hereafter the "1972 Code"),[1] which with minor modifications is currently in effect in the District of Columbia, prohibits a judge from acting as an arbitrator.[2] While no decision in this jurisdiction has addressed the issue of judges acting as arbitrators, judicia1 ethics decisions from other jurisdictions articulate the following reasons for this prohibition: (1) to ensure that a judge does not divert time from judicial work to potentially better-paid arbitration work; (2) to e1iminate the possibi1ity that judges wou1d be p1aced in a position of ru1ing on the correctness of their own decisions; (3) to prevent the exploitation of the judicial

[1] All Canons cited herein shall refer to Canons in the 1972 Code unless specifically noted otherwise.

[2] The exact language reads, "A judge should not act as an arbitrator or mediator." A footnote to this provision, reflecting an amendment adopted by the D.C. Joint Committee on Judicial Administration on February 16, 1973, provides, "The prohibition against arbitration and mediation in Canon 5E shall not be applicable to proceedings authorized by law in the Small Claims and Conciliation Branch of the Superior Court." The prohibition against full-time judges acting as arbitrators or mediators is also found in Canon 4F of the 1990 American Bar Association Model Code of Judicial Conduct (hereafter the "1990 Code"), which is currently being studied by this Committee and has not yet been adopted in the District of Columbia.

office in support of an award made by an arbitrator; and (4) to avoid embroiling a judge in social or po1itica1 controversies. *See* Arizona Supreme Court Judicial Ethics Advisory Committee (Opinion No. 88-4, May 11, 1988); Supreme Court of Delaware Judicial Proprieties Committee (Letter, September 30, 1985).

The 1972 Code takes the position that part-time judges and certain retired judges should be exempted from the flat prohibition against acting as arbitrators. The language providing the exemption is found following Canon 7, in a section entitled "Compliance with the Code of Judicial Conduct" (hereafter the "Compliance Section"). Its approach is to exempt all part-time judges from the prohibition and then to categorize certain retired judges as part-time judges.

Specifically, Subsection A of the Compliance Section reads in relevant part: "A part-time judge: (1) is not required to comply with Canon 5 ... E [which prohibits judges from acting as arbitrators]." It defines a part-time judge as "a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge."

Subsection C of the Compliance Section distinguishes between retired judges who receive the same salary as a full-time judge and are not permitted to act as arbitrators, and retired judges who receive only a part of the salary of a full-time judge and are permitted to be arbitrators. Specifically, it provides:

> A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G,[3] but, he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G.[4]
> All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges.

Thus, both the provisions for part-time judges and the provisions for retired judges recognize that the role of a neutral arbitrator is a legitimate and appropriate way for

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[3] Canon 5G provides that a judge should not accept extra-judicial appointments "to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice."

[4] Canon 5G permits judges to represent their "country, state, or 1ocality on ceremonial occasions or in connection with historical, educational, and cultural activities. "

a judge who does not receive a full salary to supplement his or her income.[5]

[5] The 1990 Code provides that a retired judge "who by law is not permitted to practice 1aw" is not required to comp1y with Canon 4F, prohibiting a judge from acting as an arbitrator or mediator, "except whi1e serving as a judge." *See* 1990 Code, App1ication Section, Subsection B(1) (Retired Judge Subject to Reca11). Retired judges who are permitted to practice law have no restrictions on their freedom to act as arbitrators. *See* 1990 Code, Application Section C(1)(b) (Continuing Part-time Judge). *See also* 1990 Code, Terminology: Continuing part-time judges" and "Periodic part-time judges." Thus, under the 1990 Code, whether our senior judges can act as arbitrators turns on whether they are permitted to practice law.

This Committee can find no law, regulation, or provision in our current Code of Judicial Conduct which prohibits our senior judges from practicing law. Indeed, the 1972 Code in its Compliance Section partially exempts retired judges who do not receive compensation equal to a full-time judge from Canon 5F's prohibition against judges practicing law. Instead, it provides that a retired judge who is deemed a part-time judge

> should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

Thus, so long as they do not practice in the Superior Court and the D.C. Court of Appea1s, it would appear that our senior judges are permitted to practice law under the Code. *See a1so* Alabama Judicia1 Inquiry Commission (Opinion No. 89-354, February 28, 1989); South Carolina Advisory Committee on Standards of Judicial Conduct (Opinion No. 6-1985, August 14, 1985) (both conc1udinq, based on state codes of judicia1 conduct modeled on the 1972 Code, that retired judges subject to recal1 may lawfully practice law); and Georgia Judicia1 Qualifications Commission (Opinion No. 1O7, February 8, 1988); Indiana Commission on Judicial Qualifications (Letter, December 8, 1983); and Louisiana Supreme Court Committee on Judicial Ethics (Opinion No. 26, February 3, 1976) (all concluding, based on state codes of judicial conduct mode1ed on the 1972 Code, that part-time judges may 1awfully practice 1aw).

While our senior judges would appear to fall into the category of retired judges who are authorized to practice law and therefore have no restrictions on their abi1ity to act as arbitrators under the 1990 Code, the confusing series of categories in the 1990 Code for part-time judges and retired judges 1eaves this open to question. Moreover, the existence of this confusion raises the possibility that this language shou1d not be adopted here in the District of Columbia. In any event, it is not c1ear that any important distinction exists in this

Judges of the District of Columbia Courts do not retire at fu11 pay. A judge who retires at the ear1iest possib1e time -- when he or she has served for ten years and has reached the age of fifty-five -- receives only twenty-eight and one-third percent of the sa1ary he or she was paid immediate1y prior to the date of retirement. *See* D.C. Code §§ 11-1562(a), 1562(b)(2), 1564(a)(1989). The maximum retirement salary of a District of Columbia judge is eighty-percent of that salary. *See* D.C. Code § 11-1564 (a). Since by law senior judges in the District of Columbia do not receive the same compensation as full-time judges, they fall within the 1972 Code provisions governing part-time judges.[6] Accordingly; the prohibition against acting as an arbitrator does not apply to senior judges of

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jurisdiction between being able to act as an arbitrator at any time and being ab1e to act as an arbitrator except while serving as a judge. *See* discussion, infra at 10-11.

[6] There could, conceivably, be an argument that a senior judge whose judicial work, when combined with retirement income from the court, provided compensation sufficient to bring his or her total income up to that of an active judge is not a part-time judge. Such a construction of the provision would be nearly impossible to administer, since the senior judge might well not know how often he or she would sit until a fiscal year concluded. Moreover, the exemptions from the various Canons for part-time judges include more than just Canon 5E relating to arbitration and mediation. They also apply to Canon 5C(2) on financial and business dealings, 5D on fiduciary activities, 5F on the practice of law, 5G on extra-judicial appointments, and Canon 6C on public reports. It would be extremely unwieldy to have these different rules applying to senior judges depending upon the amount of extra-judicial compensation they had made thus far in a year or were projected to make a year.

the District of Columbia Courts.[7]

In response to the further questions raised by our inquiring colleague, however, the Committee has considered whether the Canons impose other restrictions on a senior judge's freedom to act as an arbitrator. In examining that issue, the Committee has recognized that the role of a neutral arbitrator is similar to the role of a judge.[8] It has also recognized that budgetary limitations in District of Co1umbia may mean that from time to time funds wi11 not be avai1ab1e for senior judges to supp1ement their retirement sa1aries by part-time judicial work. Fina11y, and perhaps most significant1y, it has recognized the invaluab1e functions performed by senior judges of the Superior Court and the Court of Appea1s in assisting with the smooth and efficient operations of those courts and, according1y, the importance of not unnecessari1y deterring

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[7] *See also* Alabama Judicial Inquiry Commission (Opinion No. 90-392, April 3, 1990); Texas Judicial Ethics Committee (Opinion No. 124, September 19, 1988); Texas Judicial Ethics Committee (Opinion No. 99, July 23, 1987); Alabama Judicial Inquiry Commission (Opinion No. 86-254, March 3, 1986); Florida Committee on Standards of Conduct Governing Judges (Opinion No. 85/3, March 12, 1985) (all concluding, based on state codes of judicial conduct modeled on the 1972 Code, that retired judges may lawfully act as arbitrators).

[8] There are, of course, certain differences between arbitrators and judges. Arbitrators, while neutral, are paid by the parties and have obligations solely to the parties. Judges, who are also neutral, are paid by the public and have obligations to the public interest and the system of justice which may go beyond the interests of the parties. In the usual case, however, the similarities between judges and arbitrators would appear to outweigh their differences.

senior judges from performing that ro1e. In addition to their pre-schedu1ed part-time service, which covers vacations of fu11-time judges, assignments not otherwise staffed, and the hand1ing of overf1ow cases, they are regular1y asked to help on short notice because of i1lness or family emergencies of fu11-time judges or during periods when vacancies have not been filled. They sit on the Court of Appea1s and in every division of the Superior Court, hand1ing comp1ex, 1engthy matters as we11 as short matters. Indeed, without the services of senior judges, there would be times when active[9] trial judges wou1d be forced to handle mu1tiple assignments, with resulting delays and backlogs in the court system.

Having reviewed the Canons applicable to senior judges, the Committee has found nothing therein to suggest that senior judges cannot serve both as arbitrators and as judges in the same jurisdiction. Thus, the Committee conc1udes that the judge making inquiry here need not confine his arbitration work to the other city in which he wi11 1ive. Nonethe1ess, there are ethica1 restraints within the 1972 Code that a senior judge who sits part-time

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[9] As used in this jurisdiction, the term "active" judge denotes a full-time, non-retired judge.

as a judge and part-time as an arbitrator needs to take into account.

Canon 2A, for examp1e, which requires judges to act "at a11 times in a manner that promotes pub1ic confidence in the integrity and impartia1ity of the judiciary,"[10] is fu11y app1icab1e to a11 senior judges, as we11 as to active judges. This ethica1 princip1e wou1d prec1ude a senior judge from ever acting in a judicia1 capacity to review a matter he or she had ru1ed on as an arbitrator. It would also preclude a senior judge from conducting an arbitration in the courthouse or from using court emp1oyees or expending court resources for arbitration work.

Canon 2B, also app1icab1e to both senior and active judges, cautions against "1end[ing] the prestige of [the judicia1] office to advance the private interests of others."[11] The Committee has considered whether this would preclude a senior judge from handling any matters as an arbitrator which might eventually come before the Superior Court on a motion to confirm, modify or vacate the arbitration award. *See* D.C. Code § 16-4310, 4312 (1989). The rationale for precluding a senior judge from handling such arbitration matters would be that the prestige of the

[10] This language is also found in Canon 2A of the 1990 Code.

[11] This language is also found in Canon 2B of the 1990 Code.

senior judge might cause his or her award to be given particu1ar weight and advance the private interests of the winning party.

The Committee has concluded, however, that this is too broad a reading of Canon 2B and gives insufficient recognition to the impartiality which judges are routinely called upon to exercise. It is not uncommon for judges to review decisions made by present or former colleagues. The D.C. Code explicitly provides that Superior Court judges may be temporarily assigned to serve on the Court of Appeals and that Court of Appeals judges can be temporarily assigned to serve on the Superior Court. *See* D.C. Code § 11-707 (1989). Such assignments are likely to entail review by the designated Superior Court judge of decisions made by colleagues and review by the Court of Appeals judges of decisions made by the designated Court of Appeals colleague. These provisions are based on the assumption that the reviewing judges will be capable of impartially reviewing the decisions of their colleagues without giving those decisions undue weight. Judges who were unable to do so because of a close personal relationship or other reason would be obligated to recuse themselves. *See* Canon 3C(1)(a). Thus, the Committee concludes that Canon 2B's prohibition against "lend[ing] the prestige of [the

judicial) office to advance the private interests of others" does not foreclose a senior judge from handling arbitration matters which would later be reviewed by another judge in Superior Court or the Court of Appeals. Moreover, since the parties to an arbitration have the power to reject potential arbitrators, a party concerned about this issue ordinarily cou1d b1ock the judge from acting as the arbitrator.

The Canon 2B prohibition against judges 1ending the prestige of their office to advance the private interests of others wou1d suggest that senior judges should monitor the types of advertising done by the private arbitration organization to make certain that such advertising does not inappropriate1y exploit their judicia1 background. This wou1d not, of course, require that the organization refrain from mentioning as a basic biographica1 fact a senior judge's prior judicia1 experience, so long as basic biographical information is given about other non-judicial arbitrators on the organization's roster.

Canon 3A(5), also applicable to both senior and active judges, provides that "[a] judge should dispose promptly of the business of the court."[12] The Commentary stresses the need for judges to devote adequate time to their judicia1

duties. Thus, a senior judge who performs at different times both the roles of arbitrator and of judge should take particu1ar care to ensure that his or her arbitration duties do not interfere with the abi1ity to dispose promptly of matters which are before the judge in a judicial capacity.

The Committee has considered whether senior judges are ethically precluded from handling arbitration matters while they have judicial matters under advisement. The Committee has concluded that the answer is no. Canon 3A(5)'s general requirement that judges promptly dispose *of* the business of the court is adequate to prevent arbitration cases from receiving undue priority over outstanding judicial matters. In reaching this conclusion, the Committee notes that judicial matters remain under advisement for a variety of reasons totally beyond the control of a judge. A trial judge, for example, may have completed a trial but be awaiting the submission of proposed findings of fact, legal memoranda, the preparation of a transcript, or a supplement to the record. An appe1late judge may have circu1ated a draft opinion and be waiting for his or her colleagues to provide their input.

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[12] Similar language is found in Canon 3B *of* the 1990 Code.

A rigid policy precluding work as an arbitrator when a matter is under advisement could result in the under utilization of the talents of senior judges, who would be motivated to handle only the most ministerial matters if willing to sit at all. Further, it cou1d upset the balance between the prompt disposition of matters and the careful disposition of matters by closing off the opportunity to act as an arbitrator so long as any matter remained under advisement. Nothing in the 1972 Code requires imposition of such a rule.

Canons 2A, 2B and 3A(5), however, require that senior judges put some degree of separation between their judicial duties and their arbitration work. Senior judges are paid for their services on a per diem basis. During normal work hours, when a senior judge is being paid to perform judicial duties, a senior judge should not work on arbitration matters. To do so would be improper because of the conflict resulting from giving time to privately paid arbitration work while being paid for public judicial work. It cou1d a1so conf1ict with the requirement of prompt1y disposing of the business of the court.

The Committee has considered whether there shou1d be a hiatus of some days or weeks between working as a judge and working as an arbitrator. Were a specified time period

required between performance of judicia1 duties and working as an arbitrator, however, a judge cou1d find himself or herself unable to assist the court on short notice because of recent arbitration work. Alternatively, a date long-scheduled for arbitration might need to be moved because a trial lasted longer than predicted. Such a requirement would be difficult to administer and would result in senior judges who wished to supplement their incomes as arbitrators being hesitant to sit as senior judges. The Committee concludes that the provisions of the 1972 Code do not require such a hiatus.

Nonetheless, the Committee notes that there could come a point where it would be difficult to maintain either the public perception or the private reality of arbitration work and judicial work being handled separately. Where, for example, the two different roles were consistently alternated on a daily basis, questions would arise concerning whether the judge was devoting time to arbitration matters on days he or she was paid for judicial service and whether the time spent on arbitration matters interfered with the judge's conscientious performance of his or her judicial duties. While the Committee does not suggest that a rigid rule is necessary, it may often be appropriate for the judge to carve out blocks of time

during which he or she would perform only judicia1 functions or on1y arbitration work.[13]

In sum, the Committee has concluded that senior judges may act as arbitrators. They must not do so, however, at the same time they are being paid to sit as judges; they must not do so on court property or by using court personnel or expending court resources; and, of course, they must not review their own decisions.

[13] *See also* Alabama Judicial Inquiry Commission (Opinion No. 90-392, April 3, 1990), concluding that a retired judge who sits full-time should be subject to the same ethical restrictions as a full-time non-retired judge, including the prohibition against acting as an arbitrator.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

OF THE DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION NO.4
(February 22, 1994)

CRITERIA GOVERNING A JUDGE'S ACCEPTANCE OF AN INVITATION TO ATTEND A BAR-RELATED FUNCTION SPONSORED BY A SPECIALTY BAR ASSOCIATION

Several judges of the Superior Court have requested a formal advisory opinion of criteria governing a judge's acceptance of an invitation to attend a bar-related function sponsored by a specialty bar association.[1] Our approach to the issue initially led us to catalogue the number and types of bar-related organizations operating within the District of Columbia which might sponsor purely social or educational programs for members of the bench and bar. That preliminary survey convinced us that the sheer number of such potential sponsoring organizations was so large, and the publicly declared organizational missions and memberships of such organizations were so diverse, that it would be futile to attempt to develop a blanket rule

[1] Specialty bar associations are associations of lawyers who, in the main, represent a particular class of clients (*e.g.*, plaintiffs or defendants) or engage a specialized practice (*e.g.*, communications) or reflect a particular group of lawyers (*e.g.*, legal services, women, racial minorities). We distinguish specialty bar associations from associations, such as the unified District of Columbia Bar or a profession-wide private bar association, whose members reflect all, or many different, segments of the bar and represent all sides of various issues confronting the profession.

with regard to judicial attendance at all specialty bar-related functions. In fact, it is not always clear whether the group can properly be characterized as a bar association or is, more broadly, simply an organization of lawyers for one or more purposes.

Accordingly, our opinion seeks to identify factors and circumstances which the judge should consider in determining whether his or her attendance at a function of a specialty bar association or other lawyers' organization might create in the public's mind a reasonably held perception that the judge is promoting the public policy goals or the regularly advanced litigative positions of the host organization. The individual judge, therefore, will have to exercise sound discretion by evaluating and applying these factors and making appropriate decisions on a case by case basis.

Our focus begins with the appearance of impropriety standard embodied in Canon 2 of the 1972 Code of Judicial Conduct (hereinafter 1972 Code) presently in effect in this jurisdiction. Section B of Canon 2 in relevant part states: "[a] judge should not lend the prestige of judicial office to advance the private interests of the judge or others; nor should the judge convey or permit others to convey the impression that they are in a special position

to influence the judge." Section A of Canon 2 mandates that "(a) judge should... act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary."

Likewise, Canon 2, Section B of the proposed ABA 1990 Model Code of Judicial Conduct (hereinafter 1990 Code) in relevant part states: "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge...." Section A of Canon 2 of the 1990 Code provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

While both the 1972 and 1990 Codes permit judges to accept an invitation to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice,[2] the controlling

[2] Canon 4 (A) of the 1972: Code states: "[a] judge may speak, write, lecture, teach and participate in other activities concerning the law, the lega1 system, and the administration of justice." Canon 4D (5) (A) of the 1990 Model Code in relevant part reads: "[a] judge shall not accept, and shall urge members of the judge's family residing in the judge's household, not to accept a gift, bequest, favor or loan from anyone ***except for:*** a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement *of* the law, the legal system or the administration

appearance-of-impropriety standard requires judges to be sensitive to issues as they relate to a judge's extra-judicial activities.[3] Specifically, Section 4 A (1) of the 1990 Code in relevant part states that "[a] judge shall conduct all of the judge's extra-judicial activities so they do not cast reasonable doubt on the judge's capacity to act impartially as a judge."

We now turn to an identification of some of the factors and circumstances which judges should consider to determine whether their attendance at a function of a specialty bar association or other lawyers' organization might create an appearance of partiality.[4]

First, a judge should not attend a function sponsored by a bar association or other lawyers' organization that is currently engaged as a body in litigation before the judge.

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of justice."

[3] *See* Federal Advisory Committee on Codes of [Judicial] Conduct, Revised Advisory Opinion No. 17 (while affirming the propriety of a judge's acceptance of an invitation to an annual bar association dinner, cautions that the "[a]ppearance of impropriety might arise...if the hospitality was extended by lawyer organizations identified with a particular viewpoint regularly advanced in litigation.")

[4] An appearance of impropriety may arise even though no actual impropriety or influence upon a judge may exist. This is so because an appearance of impropriety is determined from all the facts and circumstances, even those beyond the judge's control, and because the situation is viewed from the perspective of an objective observer. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988).

Second, there is potential for an appearance of partiality when the sponsoring organization pays for the judge's attendance.

Third, the judge should consider the nature and format of the forum. If the purpose is educational and the judge pays to attend, there is less likely to be an appearance problem. If the sponsoring organization limits the audience to its membership and does not allow for the presentation of competing viewpoints, the judge's attendance poses an increased risk of apparent impropriety.

Fourth, the judge should consider the nature of the host organization. The further a specialty bar association or other lawyers' organization departs in its characteristics from those of the unified District of Columbia Bar, that is, the more oriented it is to particular issues or to the interests of a certain class of clients, the more the judge's attendance may objectively be perceived as an improper identification with those issues and interests. It goes without saying that, if there is a case of substantial importance before the court on which the judge sits, and the host organization has taken a public stance on issues to be litigated in that case, the judge should reflect very carefully before attending the activity.

Finally, consideration of whether the organization is private or governmental and, if private, whether for-profit or non-profit, should help guide the judge in determining whether to attend, keeping in mind that a non-profit, as well as for-profit, organization can be financed by special interests that may dictate the agenda.

We conclude that a judge may accept an invitation to attend functions sponsored by a specialty bar association or other lawyers' organization, provided the judge's attendance would not create in the public's mind a reasonably held perception that the judge is promoting the public policy goals or the regularly advanced litigative positions of the host organization.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OP COLUMBIA COURTS

ADVISORY OPINION NO. 5
[January 27, 1995]

WHETHER DISQUALIFICATION OF JUDGE FROM CRIMINAL MATTERS PROSECUTED BY THE UNITED STATES ATTORNEY'S OFFICE IS NECESSARY BECAUSE OF JUDGE'S PAST EMPLOYMENT WITH THE DEPARTMENT OF JUSTICE

A senior judge of the Superior Court who has resumed sitting has requested a formal advisory opinion about whether he must recuse himself from handling criminal matters prosecuted by the United States Attorney's Office for the District of Columbia if the offense forming the basis of prosecution is alleged to have occurred on a date when he was an inactive senior judge employed by the Department of Justice.

The judge who is inquiring has been a Special Assistant to the Attorney General, an Associate Deputy Attorney General and a Deputy Associate Deputy Associate Attorney General. In those positions, he has been responsible for Department-wide oversight of the debt collection activities of the Department of Justice, particularly the collection of civil and criminal fines imposed by federal judges. He has worked with all ninety-three United States Attorney's Offices (USAOs) on debt

collection matters. His role, however, has been to act as a liaison between the USAOs and the Department and to train USAO personnel with respect to debt collection litigation and policies. He has not worked on individual cases or directly supervised litigation. He has had little involvement of any kind with the USAO for the District of Columbia. Because fines imposed and collected in the D.C. Superior Court go to local rather than federal programs, he has had no connection with debt collection issues arising from matters in Superior Court.

The Committee concludes that the issue presented is largely controlled by its Advisory Opinion No. 2, 120 Daily Wash. L. Rptr. 1745 (August 17, 1992). In that opinion we addressed the question of whether a judge who formerly had been an Assistant United States Attorney in this jurisdiction needed to disqualify herself from matters pending in that Office while she was employed there. We concluded that disqualification was only necessary if during her employment she had acquired personal knowledge of or served as a lawyer in the matter in controversy, or if her impartiality might reasonably be questioned because of her former association with a lawyer who served as a lawyer in the matter in controversy. 120 Daily Wash. L. Rptr. at 1751. That conclusion appears equally applicable

here, particularly since the employment recited by the inquiring judge in this instance is more removed from matters pending in Superior Court than employment as an Assistant United States Attorney.

Advisory Opinion No. 2 was issued before the District of Columbia Courts adopted, with revisions, the 1990 ABA Model Code of Judicial Conduct (1990 Code).[1] Thus, the 1972 ABA Model Code of Judicial Conduct, as amended in 1982 and 1984 (1972 Code), was in effect. For that reason, Advisory Opinion No. 2 discussed the applicability of both the 1972 Code and the 1990 Code, which was actively under consideration for adoption at that time. Because the 1990 Code, while adopted, is not yet in effect, we follow the same procedure here.

Canon 2 of the 1990 Code, like Canon 2 of the 1972 Code, provides that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." As stated in Advisory Opinion No. 2, "[T]he standard of conduct is an objective one: Would a reasonable person knowing all the circumstances question the judge's impartiality?" 120 Daily Wash. L. Rptr. at 1749.

[1] The 1990 Code has now been adopted by the Joint Committee on Judicial Administration of the District of Columbia Courts, effective June 1, 1995.

In answering the question of whether the inquiring judge's impartiality might be questioned, the Committee looks to Canon 3E(1)(a) of the 1990 Code, which is substantively unchanged from Canon 3C(1)(a) of the 1972 Code. It provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) the judge has personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

With respect to "personal bias or prejudice concerning a party or a party's lawyer," our Court of Appeals has ruled that "[m]ere allegations based on a judge's background are insufficient to suggest partiality toward the parties before him." *See* Gregory v. United States, 393 A.2d 132, 143 (D.C. 1978). Thus, as we concluded in Advisory Opinion No. 2, there is no presumption of bias or prejudice simply by virtue of the judge's past employment. 120 Daily Wash. L. Rptr. at 1751.

As Canon 3C(1) (a) demonstrates, there is no question that if the inquiring judge, by virtue of his past employment at the Department of Justice, has "personal knowledge of disputed evidentiary facts," then he must disqualify himself. The inquiring judge must take care to

insure that this is not the case. On the facts as presented, however, it would appear unlikely that he will have personal knowledge of disputed evidentiary facts.

Canon 3E(1) (b) of the 1990 Code, which is substantively unchanged from Canon 3C(1) (b) of the 1972 Code, provides in relevant part that a judge should also disqualify himself or herself where:

> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter...

The facts given the Committee indicate that the inquiring judge would not likely have served as a lawyer in any matter coming before him in Superior Court. On the other hand, if all lawyers employed by the Department of Justice, including those in the United States Attorney's Office, are deemed to “practice law” together, the language of Canon 3E(1)(b) would suggest that disqualification would be required.

The commentary to Canon 3E(1)(b), however, limits this language with respect to judges formerly employed in government. It states:

> A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1) (b); a judge formerly employed by a government agency, however, should

> disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Thus, the mere fact that lawyers from the United States Attorney's Office were employed by the same government agency as the judge, that is, the Department of Justice, would not alone be sufficient to require the inquiring judge to disqualify himself. *See* Advisory Opinion No. 2, 120 Daily Wash. L. Rptr. at 1751. *Cf.* United States v. Zarqari, 419 F. Supp. 494, 505 (N.D. Cal. 1976).

The facts forming the basis of this inquiry are distinguishable from those analyzed in Scott v. United States, 559 A.2d 745 (D.C. 1989). In Scott, the Court of Appeals concluded that, without the consent of a defendant, a trial judge cannot handle a criminal matter prosecuted by the United States Attorney's Office while actively negotiating for employment with the Justice Department's Executive Office for United States Attorneys. [The employment sought by the trial judge involved "oversight responsibility and policy guidance to the Debt Collection Units in the United States Attorney's Offices." 559 A.2d at 750.] The Court of Appeals concluded that "from the perspective of 'the average person,' a fully informed person might reasonably question whether the judge 'could

decide the case with the requisite aloofness and disinterest when he [was seeking] employment [in the prosecutor's executive office in the department prosecuting] the case.'" 559 A.2d at 750.

There is a significant difference, however, between a judge who is seeking an employment position, where the employer is in a position to either confer or withhold a benefit, and a judge who has left an employment position. Once the judge is no longer in the role of applicant, the rule providing that partiality cannot be presumed based on a judge's background becomes controlling.

In sum, the Committee concludes that the inquiring judge need not disqualify himself from criminal matters where the offense charged was committed while he was employed by the Department of Justice unless he has personal knowledge of material facts, he has served as a lawyer in the matter in controversy, or his impartiality might reasonably be questioned because of some particularized former association with a lawyer who served as a lawyer concerning the matter.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION No. 6
(September 15, 1995)

WHETHER A JUDGE OF THE SUPERIOR COURT MUST DISQUALIFY HIMSELF FROM PRESIDING OVER CRIMINAL MATTERS PROSECUTED BY THE OFFICE OF THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA BECAUSE THE SPOUSE OF THE JUDGE IS AN ASSISTANT UNITED STATES ATTORNEY ASSIGNED TO THE SUPERIOR COURT

A judge of the Superior Court has requested an advisory opinion concerning whether he must recuse himself from presiding over criminal matters prosecuted by the Office of the United States Attorney because his spouse was recently hired as an Assistant United States Attorney for the District of Columbia. At the time of the judge's request, the spouse was expected to join the office shortly. We understand that she has since begun work as an Assistant United States Attorney, and that her duties will inevitably include the trial of cases in the Superior Court. The judge intends to disqualify himself from any criminal case in which, so far as can be ascertained, his spouse has participated at any stage. We assume further, since Assistant United States Attorneys commonly are assigned to the calendar of a judge as part of two-or-more-member "teams," that the spouse will not be assigned to the

judge's "team" and that, accordingly, no issue of disqualification arising from this immediate association between the spouse and another attorney who appears before the judge will arise. With these exceptions, the judge's inquiry relates to his obligation *vel non* to recuse himself from the entire body of criminal cases prosecuted by the United States in Superior Court.

In our opinion, the judge is under no general obligation to disqualify himself from participation in these cases. Of course, the circumstances of individual cases may dictate otherwise: for example, the judge's spouse, although having had no involvement in a case immediately before the judge, may have taken part in a related prosecution. In such cases, the judge's obligation to avoid even the appearance of partiality may impose on him the duty to recuse. But, in general, we apprehend no reason for imputing to the judge, even as a matter of appearance, the status of advocate or partisan which his spouse occupies by virtue of her position as Assistant United states Attorney.[1]

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[1] The spouse's position may fairly be termed partisan despite our recognition that "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution

The standards governing this inquiry are contained in the Code of Judicial Conduct (1995), adopted by the Joint Committee on Judicial Administration of the District of Columbia Courts effective June 1, 1995.[2] Canon 3 B. (1) of the Code provides that "[a] judge *shall* hear and decide matters assigned to the judge except those in which disqualification is required" (emphasis added). Canon 3 E. in turn governs disqualification. It provides, in Canon 3 E. (1), that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances" which it then proceeds to illustrate. Interpreting predecessor language of the 1972 Code, this Committee concluded "that the standard of conduct is an objective one: Would a reasonable person knowing all the circumstances question the judge's impartiality?"[3] Indeed, as is true of the 1972 Code, the presence of the adverb

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is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

[2] The judge in question began his assignment to criminal cases before June 1, 1995, at a time when judges in this jurisdiction were subject to the ABA Code of Judicial Conduct (1972, as amended in this jurisdiction in 1982 and 1984). However, we have found no differences between the respective Codes affecting the issue before us, and hence are comfortable in taking as our text the 1995 Code.

[3] Advisory Opinion No. 2 ("Disqualification of Judge Because of Past Employment by Law Enforcement Agencies and Spouse's Present Affiliation with Metropolitan Police Department"), 120 Daily Wash. L. Rptr. 1745, 1749 (August 17, 1992).

"reasonably" in Canon 3 E. (1) permits no other conclusion than that the standard is objective, requiring us to "factor out," for example, "those subjective perceptions particular to parties before the judge about the fairness of the proceedings and partiality of the tribunal."[4]

We begin by inquiring, as we did in Advisory Opinion No. 2, *supra* note 3, whether the judge's spouse should be regarded as an officer ... of a party" for purposes of Canon 3 E. (1)(d)(i), which requires the judge to disqualify himself or herself whenever the judge's spouse (among other persons) "is a party to the proceeding, or an officer, director or trustee of a party." The Code does not define "officer," but we have little difficulty in concluding that, as applied to this ground for disqualification, the term does not include a non-supervisory Assistant United States Attorney such as the judge's spouse in this case, who exercises no command or supervisory responsibility in relation to the prosecutor(s) assigned to the proceeding before the judge. The simple coupling of "officer" with "director" and "trustee"

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[4] Advisory Opinion No. 2, 120 Daily Wash. L. Rptr. at 1749 n.5. *See also* Advisory Opinion No. 5 ("Whether Disqualification of Judge From Criminal Matters Prosecuted by the Office of the United states Attorney is Necessary Because of Judge's Past Employment with the Department of Justice") (January 27, 1995).

connotes to us a level of responsibility beyond the duties of an ordinary line Assistant United States Attorney.

We turn, therefore, to Canon 3 E. (1)(c) & (d)(iii), and inquire whether the judge reasonably may be said to know that his spouse has "any ... more than de minimis interest that could be substantially affected" by the outcome of criminal cases tried before him, even though she has not participated in them at any stage. In Advisory Opinion No. 2, we posed this question with regard to the spouse of a judge who was a senior supervisory member of the Metropolitan Police Department. We first took almost as a given that "the spouse, as a salaried governmental official, has no financial interest that would be substantially affected by the outcome of such proceedings." That the same holds true of a salaried Assistant United States Attorney is evident and requires no further discussion. In the case of the senior police official, we next had to consider whether his institutional affiliation and identity constituted a significant (not de minimis) interest that could be affected by the outcome of particular criminal proceedings before the judge. The inquiry yielded different answers depending, for example, on whether a proceeding might include testimony by police

officers assigned to the particular police district commanded by the spouse, or raise a question of police policy or practice of the sort the spouse as a senior official could have had a hand in formulating or administering on a department- or district-wide basis.

None of these considerations, however, all derived from the police official's status as a supervisor or command-level employee, concerns us in the present matter. The judge's spouse, one of approximately 293 attorneys currently employed by the United States Attorney's Office and approximately 151 assigned to the Superior Court,[5] cannot reasonably be said to have more than what may be termed a solidarity or loyalty interest in the results of particular cases tried before the judge. As a member of the collective body *of* Assistants, it may enhance her pride and sense of group accomplishment to know that particular cases have been "won," but this interest is surely de minimis and, moreover, would not be substantially affected by the verdicts in trials (individual or collective) conducted before this single Superior Court judge. As one court has stated in considering a similar issue, “[T]he prestige *of* the [prosecutor's] office as a whole is not greatly

[5] We assume, for purposes of this opinion, that the spouse ***is*** currently assigned to the Superior Court.

affected by the outcome *of* a particular case," *Smith v. Beckman,* 683 P.2d 1214, 1216 (Col. App. 1984), nor even by a "string" of successes before a particular judge. Group solidarity as applied to the entire contingent of Superior Court prosecutors, is too slender an interest on which to require disqualification of the judge because of his spouse's employment.

There remains for us to consider, nevertheless, whether the broad "appearance *of* impropriety" standard, Canon 2,[6] demands disqualification of a judge whose spouse -- his partner "in a relationship more intimate than any other kind of relationship between individuals," *Smith, supra* -- is affiliated with an institution which appears regularly in the role of advocate before the judge. Canon 2 does not require us to accept the notion that spouses today are unable to separate the identity and intimacy they share as marital partners from the independence they exercise as professionals in their employment. We say this not out of any obeisance to prevailing "correctness," but in commonplace recognition that women today pursue careers and that success and esteem in professional life -- certainly in the legal profession, certainly in this city,

[6] "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

and certainly far more than heretofore -- are gained by individual, independent achievement. It is true, of course, that married persons "share confidences regarding their personal lives and employment situations," *id.*,[7] but if that means -- in this case -- no more than that the judge and his spouse discuss together the day-to-day workings of the U.S. Attorney's Office, then it is too frail a consideration on which to compel recusal. If, on the other hand, the shared "confidences" were to extend to individual cases, then Canon 3 could well demand disqualification in any event because of the judge's "personal knowledge of disputed evidentiary facts concerning the proceeding." Canon 3 E. (1)(a). Beyond this, we are content to rely on the good judgment of the spouse and the judge. As we stated in Advisory Opinion No. 2 (here paraphrasing slightly), "[W]e think a reasonable person, knowing the spouse's position as [an Assistant United States Attorney], would assume that the spouse would exercise great circumspection in discussing with the judge [her] knowledge of cases that might possibly come before [him], precisely

[7] This was a primary reason why a Colorado court of appeals in *Smith* determined that "the existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification ...." 683 P.2d at 1216. As we know nothing about the size of the county, the court, or the district attorney's office in *Smith*, we are reluctant to criticize the *Smith* opinion.

to avoid disqualifications burdensome to the court." 120 Daily Wash. L. Rptr. at 1750.

Subject to the exceptions stated herein, therefore, we conclude that the judge is not required to disqualify himself in the circumstances presented to us for opinion. It follows that, in these cases, the judge is under no obligation to disclose to the parties the fact that his wife is an Assistant United States Attorney. *Cf.* Canon 3 F (where judge is *disqualified* by the terms of Canon 3 E, the judge "may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider ... whether to waive disqualification").

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

OF THE

DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION NO.7
(January 24, 1997)

RULES GOVERNING JUDICIAL CLERK'S RECEIPT FROM PROSPECTIVE PRIVATE EMPLOYER OF (1) TRAVEL, MEAL, AND LODGING EXPENSES TO COVER RECRUITING VISITS, (2) PRE-EMPLOYMENT PAYMENTS TO COVER MOVING, HOUSING, AND BAR REVIEW EXPENSES, AND (3) PRE-EMPLOYMENT HIRING BONUSES AS REWARDS FOR COMMITMENT TO FUTURE EMPLOYMENT OR AS ADVANCES ON FIRST YEAR SALARY

We are presented with questions whether, and if so when during the clerkship year, a judicial clerk may receive -- while on the government payroll -- payments from a prospective employer for (1) expenses such as travel, meals, and temporary lodging while seeking employment, (2) coverage, either by gift or loan, of anticipated expenses incident to permanent employment, such as relocation costs, bar review course fees, and downpayment money for housing, and (3) a pre-employment hiring bonus or loan to induce and reward acceptance of an employment offer, or as an advance on the first year's salary.

In contrast with the federal court system,[1] we have no code of conduct expressly applicable to law clerks.

[1] *See* Judicial Conference of the United States, Code of Conduct for Law Clerks (1981).

Nonetheless, these questions arise because a judge's clerk is close enough to being a judicial officer, and the clerk's actions thus reflect enough upon the court, that ethical norms should be applied to clerks similar to those governing judicial conduct. We therefore address the questions presented (as we have on an earlier occasion) by reference to the Code of Judicial Conduct of the District of Columbia Courts (1995) and relevant ethics opinions, in order to discern apt principles to govern law clerk activities.[2]

I.

We are only minimally concerned here about a clerk's acceptance of travel, meal, and temporary lodging expenses paid for by a prospective employer when the clerk visits the employer for an interview -- provided, of course, that such payments are reasonable in amount for the types of expenses covered (including those of an accompanying spouse or companion). There is not an appearance of impropriety, let alone any actual impropriety, in acceptance of such expenses because everyone knows the typical clerkship is limited to a period of one or two years and the clerk

[2] *See* Advisory Committee on Judicial Conduct of the District of Columbia Courts, Advisory opinion No. 1 (Dec. 18, 1991) (Application for and Acceptance of Future Employment by Judicial Law Clerks).

necessarily will have to pursue future employment, sometimes in a community far from the District of Columbia, while still serving the judge. *See* Judicial Conference of the United States, Code of Conduct for Law Clerks (1981), Canon 5C(1) ("During the clerkship the clerk may seek and obtain employment to commence after completion of the clerkship"); Judicial Conference of the United States, Committee on Codes of Conduct Advisory Opinion No. 83 (citing Law Clerk Canon 5C(l)); *see also* federal Code of Conduct for Law Clerks, Canon 6B.[3]

II.

A more serious question presented here is attributable to a common law firm practice -- in the hope of enticing recent law school graduates, and especially judicial law clerks -- of giving recruits substantial payments, in amounts that can total as much as $5,000 to $10,000 or even more, to cover major moving, housing, and bar review expenses months before they report for work. Even without such payments, any clerk would have to be recused from

[3] Federal Canon 6B provides:

> Expense Reimbursement. Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by a law clerk and, where appropriate to the occasion, by the law clerk's spouse. Any payment in excess of such an amount is compensation.

participating in any case that involved the private employer. *See* Advisory Opinion No.1, *supra* note 1. But that is not the only problem. There is an arguable unseemliness in a judicial clerk's accepting what appears to be private-employer compensation while still serving as a public employee, irrespective of any particular case before the court. A public employee, conducting judicial functions, should serve the public with undivided loyalty and attention, without undue attachment to private interests that might be seen as coloring or even influencing that employee's views and allegiances. Thus, acceptance of an early payment -- call it payroll money --from a private employer during the clerkship term creates at least an appearance of divided attention, if not of divided loyalty, that requires a clear statement from this committee about the propriety of such practices. Judicial clerks and prospective private employers alike need to understand what limits, if any, there are.

In identifying the problem, we do not examine all situations that reasonably can be anticipated. We must say, however, that the need of the judicial system -- and thus of the public -- to attract superior judicial clerks, coupled with the realities inherent in legitimately pursuing private employment for the period immediately

after the clerkship, cut in favor of reasonable accommodation of the clerk's personal needs for a smooth transition without financial hardship. These transitional needs, most commonly moving and housing deposit or downpayment expenses, are as significant for the young lawyer, once new employment has been secured, as the earlier needs for transportation, meals, and lodging during the recruiting period.

All things considered, we conclude that a judicial clerk may receive from the new employer reasonable sums offered as pre-employment payments to cover relocation, housing, and bar review expenses. *See* Federal Advisory Opinion No. 83. These amounts must be limited to reasonable expenses actually incurred or anticipated for the post-clerkship period; any such payment may not instead represent a standard, lump sum amount the employer has allocated for such a purpose to each incoming lawyer having the clerk's status, without regard to an actual expense.[4]

[4] Because the reimbursable expenses we address here relate to the post-clerkship period, we assume that such payments ordinarily will not be received until sometime during the last three months of the clerk's service with the judge. We impose no such particular time limitation, however, recognizing the possibility that a judicial clerk who accepts post-clerkship employment on the west coast, for example, may need to make housing arrangements during a vacation period (*e.g.*, December-January) that would require employer advances earlier in the clerkship year.

III.

There is a final concern. Some private employers provide new recruits with hiring bonuses, unrelated to particular anticipated relocation, housing, or bar review expenses, simply "as a reward for commitment to future employment at the firm or as an advance on his or her first year salary." Federal Advisory Opinion No. 83. The majority of the federal court committee, our counterpart, concluded that "such bonuses, if received during the clerkship, violate the letter as well as the spirit of [federal law clerk] Canon 5C(2)," to wit:

> [A] law clerk ... should [not] accept a gift, bequest, favor, or loan from any person whose interests have come or are likely to come before the court in which the law clerk serves ....

Federal Advisory Opinion No. 83. The committee reached that conclusion despite the fact that the clerk would be recused from participating in any case in which the prospective employer appeared before the court or otherwise had an interest in such litigation. Any other outcome, according to the committee majority, would "undermine confidence in the integrity of the *court* itself," since a loan or salary supplement would reflect a "direct and personal relationship between an officer of the court and a member of the judge's chambers." *Id.*

For purposes of this opinion we rely on federal Law Clerk Canon 5C(2), as well as on the reasoning of Advisory Opinion No. 83 and the concerns expressed at the outset of Part II. above, to conclude that a judicial clerk should not accept from a prospective employer, during the term of the clerkship, any payment not earmarked to cover particular relocation, housing, and bar-related expenses after the clerkship. Like the federal committee, we are concerned that such pre-employment bonuses, unrelated to actual payment of customary employment transition expenses, would appear to be a private-sector subsidy of a judicial employee intended to compensate for low clerkship salaries -- an arrangement that could suggest the subsidizer had some kind of relationship with the court, helping to pay the court's way, that reflected an improper, if not unlawful, purchase of the justice system for private ends.

We recognize that some employers have a uniform, "lump sum" policy to deal with prospective employee transition expenses and hiring bonuses, payable before commencement of the employment relationship. These employers choose not to address the individual needs of new lawyers -- reflecting major differences in moving expenses and housing preferences -- that could lead to time - consuming haggling over what is fair individually and overall. These

employers prefer to pay a single sum large enough to cover expenses in all circumstances plus a reasonable incentive to accept the offer of employment. The rules announced herein should not affect such a policy; an employer with a uniform, "lump sum" expense/bonus approach can simply defer payment to a judicial clerk until after the former clerk arrives at work, except for payment of actual expenses incurred or anticipated for the period after the clerkship.

We stress again that the payments considered in all parts of this opinion include loans as well as compensation; the relationship with a prospective employer is no less when the employer lends, rather than gives, the recruit money.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

OF THE

DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION NO. 8
(March 21, 2000)

CRITERIA FOR USE OF JUDGE'S NAME ON LETTERHEAD
IN SOLICITATION OF FUNDS

The Advisory Committee on Judicial Conduct has received an inquiry from a judge of the District of Columbia Court of Appeals. The inquiry requests an opinion on whether a judge may permit his or her to appear on the letterhead of the Council for Court Excellence (CCE) when that letterhead appears above a solicitation for funds for the CCE. The letterhead includes the judge's name and title.

In an informational sheet provided to the public, the CCE describes itself as follows:

> [T]he Council for Court Excellence is a nonprofit, nonpartisan, civic organization. The Council works to improve the administration of justice in the local and federal courts and related agencies in the Washington metropolitan area and in the nation. The council accomplishes this goal by:
>
> - Identifying and promoting court reforms,

- Improving public access to justice, and
- Increasing public understanding of our justice system.

We understand that the CCE makes requests of governmental agencies and private foundations for grants, and sends fund-raising letters to attorneys, judges and the general public. In addition, the CCE holds an annual dinner at which an award is presented; the CCE considers this occasion, at least in part, a fund-raising event.

The following provisions of the Code of Judicial Conduct of the District of Columbia Courts (1995) ("the Code") are pertinent to the inquiry:

> **Canon 2B:**
>
> A ... Judge shall not lend the prestige of judicial office to advance the private interest of the judge or others....
>
> **Canon 4C(3):**
>
> A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice,[1] or of an educational, religious, charitable, fraternal or civil organization not conducted for profit subject to the

[1] In this opinion, we sometimes use "law-improvement organization" as a short hand for "organization or governmental agency devoted to the enforcement of the law, the legal system, or the administration of justice."

> following limitations and the other requirements of the code.
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> * * * * * * * * *
>
> (b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:
>
> > (i) may assist such an organization in planning fund-raising..., but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may participate in solicitation of funds, other than from lawyers and from the general public, on behalf of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice, and may solicit funds from other judges over whom the judge does not exercise supervisory authority;
>
> * * * * * * * * *
>
> > (iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Under Canon 2B, a judge as a general rule may not lend the prestige of the judge's office to advance the private interest of anyone. Under Canon 4C(3)(b), however, a judge may serve as officer, director, trustee or non-legal

advisor of a law-improvement or charitable organization and may assist that organization in managing and investing its funds. A judge may not "personally participate in solicitations of funds or other fund-raising activities" for such organizations. Canon 4C(3)(b)(i), however, contains two exceptions to the prohibition on soliciting funds. First, a judge may "participate in the solicitation of funds, other than from lawyers and the general public, on behalf of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice...." Second, a judge may solicit funds from other judges over whom the judge exercises no supervisory or appellate authority.

In answering the inquiry, our first task is to construe the exceptions to the general prohibition on participation in fund-raising. The first exception is for a solicitation on behalf of a law-improvement organization. A judge may participate in such a solicitation so long as the solicitation is not "from lawyers and the general public." Our interpretation of this provision is aided by the commentary to Canon 4C(3)(b)(i), which states in relevant part:

> Section 4C(3)(b)(i) of the ABA's 1990 Model Code of Judicial Conduct has

> been amended here to incorporate a provision from the 1972 ABA Code of Judicial Conduct permitting judges to solicit funds for organizations or governmental agencies devoted to the improvement of the law, the legal system, or the administration of justice, provided judges do not solicit from the general public, including lawyers. The intention here is to authorize judges to help such organizations seek funding from private and governmental fund-granting agencies that would ordinarily be receptive to such requests and would not feel overreached or importuned improperly by an approach from a judicial officer.[2]

The commentary makes clear that the first exception to the prohibition on participation in fund-raising extends only to solicitations on behalf of law-improvement organizations and then only to solicitations from private and public "fund-granting agencies." A judge may personally

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[2] Canon 25 of the American Bar Association's 1923 Canons of Judicial Ethics prohibited a judge from soliciting for charities. The ABA's 1972 Code of Judicial Conduct permitted a judge to serve as an officer or director of a law-improvement organization and permitted the judge to "assist such organization in raising funds," but prohibited the judge from "personally participat[ing] in public fund raising activities." Canon 4C. Thus, a judge was allowed to assist a law-improvement organization in fund-raising but could not personally participate in "public" fund raising. A judge was also prohibited from soliciting funds for charitable crgani2ations. Canon 5B(2).

The ABA's 1990 Model Code of Judicial Conduct prohibits "personal participat[ion] in the solicitation of funds or other fund-raising activities" whether "public" or not, subject to the single exception that a judge may solicit funds from judges over whom the judge exercises no supervisory or appellate authority. Canon 4C(3)(b)(i). As stated in the commentary to the District of Columbia Code's Canon 4C(3)(b), the intention of the District of Columbia Code is to return to the 1972 Code's permission to solicit funds on behalf of law-improvement organizations where such solicitations are not directed to the "general public." In addition, under the District of Columbia Code, the solicitation cannot be directed to lawyers.

participate in fund-raising activities from such agencies, subject always to the general rule of Canon 4C(3)(b)(iv) that when the judge does so the judge not go beyond personal participation to the point of "us[ing] or permit[ting] the use of the prestige of the judicial office" in the fund-raising.

The second exception to the ban on participation in fund-raising is for soliciting funds, on behalf of charitable organizations, "from other judges over whom the judge does not exercise supervisory or appellate authority."[3] This exception is contained in the 1990 Code of Judicial Conduct and thus represents no change in the rules as they existed when the District of Columbia Code was approved.

The question before the committee is whether the use of a judge's name on the CCE's letterhead in a fund-raising solicitation is governed by Canon 4C(3)(b)(i). If it is, that participation is subject to the prohibition on such fund-raising except where directed, on behalf of law-improvement organizations, to private and governmental fund-granting agencies, or except where directed to a judge over whom the judge whose name appears in the letterhead

[3] This exception is not limited to solicitations on behalf of a law-improvement organization.

exercises no supervisory or appellate authority. In order to answer this question, we find it helpful to review the way in which prior codes have dealt with the issue of a judge's name appearing on a letterhead.

As noted, n. 2 above, Canon 25 of the 1923 Canons of Judicial Ethics prohibited solicitation for charities. This canon was construed to prohibit the use of the judge's name on a letterhead used for soliciting funds, though a judge was allowed under that code to be a member of charitable organizations and contribute to them. Advisory Opinion No. 22, American Bar Association 1923 Canons of Judicial Ethics. The 1972 Code permitted a judge to serve as an officer or director of a law-improvement organization, and allowed the judge to participate in fund-raising for such an organization *so* long as the judge did not "personally participate" in "public" fund-raising. Canon 4C. A judge could also serve as a director or officer of a charitable organization, but could not solicit funds for such an organization. Canon 5B(2). The 1972 Code did, however, explicitly allow the judge to "be listed as an officer, director, or trustee of such organization". Id. In light of this explicit permission, Advisory Opinion No. 35 concluded that there was "now no impropriety in the judge permitting his name to be used on stationery and

other material used for solicitation purposes provided that his name and office are in no way selectively emphasized by the organization." The 1990 Code of Judicial Conduct does not address the letterhead issue explicitly, but the commentary to Canon 4C(3) of that code states that "[u]se of an organization letterhead for fund-raising ... does not violate Section 4C(3) if the letterhead lists only the judge's name ...."

When the Advisory Committee on Judicial Conduct, established by the Joint Committee on Judicial Administration of the District of Columbia Courts, drafted the Code, it received a recommendation from the District of Columbia Judicial Tenure and Disabilities Commission concerning the letterhead issue. The commission recommended that "consideration...be given to adding a provision to make it clear that a judge's name may not be used on a civic or charitable organization letterhead that is used for fund-raising." The Advisory Committee adopted that recommendation, and drafted a proposal for public comment that would have prohibited use of a judge's name on a letterhead used for fund-raising. A comment on the draft suggested that the ban on use of a letterhead might prohibit judges from allowing their name to appear on letterheads addressed to government agencies providing

grants. In response to that comment, the Advisory Committee changed the language of the commentary to state an exception to the ban on using a judge's name on a letterhead. The commentary now states:

> Use of an organization letterhead for fund-raising or membership solicitation will violate Section 4C(3)(b) if the letterhead lists the judge's name, unless the solicitation is directed to a governmental agency.

The commentary does not mention what provision of Canon 4C(3)(b) use of a letterhead will violate (subject to the exception named in the commentary). As we have discussed, Canon 4C(3)(b)(i) contains a general prohibition on "personal[ ] participat[ion]" in fund-raising. If use of a letterhead is considered "personal participation," then the exception for letterhead solicitations contained in the commentary would be both less and more restrictive than the exceptions to the prohibition on fund-raising in Canon 4C(3)(b)(i). Those exceptions permit personal fund-raising directed to judges over whom the judge exercises no appellate or supervisory authority, and also, as the commentary states, fund-raising on behalf of law-improvement organizations directed to private as well as governmental fund-granting agencies. The commentary's exception to the general ban on use of letterhead is not

restricted to fund-raising on behalf of law-improvement organizations, and in this sense is less restrictive than the exception contained in Canon 4C(3)(b)(i). At the same time, it is more restrictive in that it limits the object of the solicitation to governmental agencies, excluding judges over whom the judge exercises no supervisory or appellate authority and excluding private fund-granting agencies. Thus, if the commentary were addressed to Canon 4C(3)(b)(i), it would need modification.

If use of a letterhead is not-covered by Canon 4C(3)(b)(i) ("personal [ ] participat[ion]" in solicitation of funds or fund-raising), it would be prohibited only by Canon 4C(3)(b)(iv), which provides that a judge "shall not use or permit the use of the prestige of judicial office for fund-raising...." Use of the letterhead would be considered a use of the prestige of judicial office for fund-raising, and thus would be prohibited, subject to the exception stated in the commentary for fund-raising, on behalf of any charitable organization, directed to a governmental agency. This interpretation, however, yields an illogical incongruity. A judge who was on the board of directors of a law-improvement organization like the CCE could, under Canon 4C(3)(b)(i), personally solicit funds from a private fund-granting agency, but could not, under

Canon 4C(3)(b)(iv), allow his or her name to be used on a letterhead in a solicitation addressed to that same agency. A judge could personally solicit funds, on behalf of any charitable organization, from judges over whom the judge held no appellate or supervisory authority, but could not allow his or her name to appear on a letterhead in a statement directed to those same judges. Yet, the danger of use of the prestige of judicial office would, if anything, be greater in personal fund-raising than in use of the judge's name on a letterhead.

Faced with the difficulties in interpretation we have discussed above, the committee is of the view that use of a letterhead should be considered "personal participat[ion]" in fund-raising, subject to the general prohibition, with its exceptions, contained in Canon 4C(3)(b)(i). As we have recounted, this committee, when it drafted the present code, initially agreed with the Judicial Tenure and Disabilities Commission's recommendation that there be a total ban on use of a judge's name on a letterhead in fund-raising. This approach is consistent with the general rule in Canon 4C(3)(b)(i) banning personal participation in fund-raising. The drafters of the Code recognized a need for an exception to that ban for solicitations directed to governmental agencies. Canon 4C(3)(b)(i) also contains an

exception for solicitations, on behalf of law-improvement organizations, to governmental agencies. It is true that Canon 4C(3)(b)(i) contains additional exceptions for solicitations on behalf of law-improvement organizations directed to private fund-granting agencies and for solicitations directed to judges over whom the judge possesses no supervisory or appellate authority. Since solicitations by a letter containing a judge's name on the letterhead present less danger of misuse of judicial prestige than personal participation in fund-raising, applying those exceptions to letterhead fund-raising is consistent with the policies underlying Canon 4C(3)(b)(i). On the other hand, if fund-raising by letter with the judge's name on the letterhead were not considered personal participation, such a solicitation on behalf of an organization like the CCE would be more restricted than personal fund-raising. The committee considers this result inconsistent with the canon's intent to permit, in limited situations, fund-raising on behalf of law-improvement organizations, and to permit solicitation of funds from other judges over whom the judge exercises no supervisory or appellate authority.

Accordingly, we conclude that use of a judge's name on a letterhead accompanying a fund-raising solicitation is

prohibited, unless the solicitation is directed to a judge over whom the judge exercises no supervisory or appellate authority, or, if made on behalf of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice, is directed to private and governmental fund-granting agencies. Since the CCE is a civic, charitable organization, the express purpose of which is the improvement of the administration of justice, a judge may allow his or her name to appear on the CCE’s letterhead in a solicitation for funds without violating 4C(3)(b)(i), so long as the solicitation meets the foregoing conditions.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

OF THE

DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION No. 9
(May 3, 2001)

DISQUALIFICATION OF JUDGE BECAUSE OF
SPOUSE'S POSITION AS CORPORATION COUNSEL

A judge of the Superior Court has requested a formal advisory opinion addressing possible disqualification issues arising from the status of her spouse as Corporation Counsel, that is, the chief legal officer of the District of Columbia. In that capacity, he shall "have charge and conduct of [sic] all law business of the said District, and all suits instituted by and against the government thereof." D.C. Code § 1-361. While day-to-day activities of the office are carried out by a large staff of Assistant Corporation Counsels, these attorneys operate "under the direction and control of the Corporation Counsel" and perform such duties as may be "assigned to them by the said Corporation Counsel." § 1-362.

I.

We have previously had occasion to consider at some length the ethical issues presented when a judge of the

Superior Court has a spouse who occupies a high supervisory position in the District of Columbia. In Advisory Opinion No. 2, that spouse was a Deputy Chief of Police with the Metropolitan Police Department and Commanding Officer of the First District, one of seven patrol districts in the city. We identified there the portions of the Code of Judicial Conduct that might be of particular relevance in such a situation, including the following provisions of Canon 3E:[1]

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might

[1] At the time of Advisory Opinion No. 2, our judges were governed by the ABA Code of Judicial Conduct, as amended. In 1995, the Joint Committee on Judicial Administration adopted the presently controlling Code of Judicial Conduct. The Advisory Opinion noted that insofar as relevant here, both Codes were substantially similar, with the exception that the old Code referred to simply an "interest" while the new Code referred to a "de minimis interest." In the circumstances of the present inquiry we do not think we need address this particular difference.

reasonably be questioned, including but not limited to instances where:

* * *

(c) the judge knows that he or she...or the judge's spouse... has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding:

(d) the judge or the judge's spouse...

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;[2]

(iii) is known by the judge to have a more than de minimis interest

[2] We did not include this subsection in addressing disqualification where the spouse was a Deputy Chief of Police but it is obviously relevant in the present case.

that could be substantially affected by the proceeding.

We will not repeat here the background analysis that we gave with respect to these provisions and their application in Advisory Opinion No. 2,[3] but instead focus on the status of Corporation Counsel in relation to those provisions. We conclude that while it may not be crystal-clear whether or not any particular provision applies to require disqualification in itself, the likelihood that every one of them could be reasonably viewed as applicable is sufficient to permit the conclusion that "the judge's impartiality might reasonably be questioned."

A.

First, we inquire whether the judge's spouse should be regarded as "an officer" of a "party" in any case in which the District of Columbia is a party to the proceeding under

[3] Nor shall we repeat here the admonition applicable to all judges as to the acquisition of "personal knowledge of disputed evidentiary facts" through their spouses. Advisory Opinion No. 2, part B at pp. 7-8, discussing present Canon 3E(1)(a). See also Advisory Opinion No. 6 at pp. 7-8, discussing the same issue in the context of an Assistant United States Attorney as the spouse of a judge sitting on criminal matters, and more generally Federal Judicial Conference Committee on Code of Conduct Advisory Opinion No. 60 (as reviewed Jan. 16, 1998), dealing with the appointment of the spouse of an Assistant United States Attorney as a part-time magistrate judge..

Canon 3E(1)(d)(i). In Advisory Opinion No. 2, we observed that it might be thought that the drafters had in mind an "officer" of a private or commercial entity, but that nonetheless there was authority that officials of governmental agencies are "officers" within the meaning of the canon. With respect to a Deputy Chief of Police, we assumed that he was an "officer," but of the Metropolitan Police Department, which was not itself a "party." The Corporation Counsel, however, has responsibilities extending across the full range of the executive branch and is plainly one of the top officials of the government of the District.

B.

Second, we address whether Corporation Counsel can be deemed to have a "more than de minimis interest[4] that could be substantially affected by the proceeding" under Canons 3E(l)(c) and (d)(iii). In Advisory Opinion No. 2, we noted that the Deputy Chief of Police, "as a salaried government

[4] A "de minimis interest" is defined, somewhat circularly, as "an insignificant interest that could not raise reasonable question as to a judge's impartiality."

official, has no financial interest that would be substantially affected." While in a more general sense, he had an interest in the successful outcome of criminal proceedings, we concluded that such considerations were too indirect to require across-the-board recusal. We did express the view, however, that the judge should recuse in cases where officers testifying in a criminal proceeding were assigned to the First District, commanded by the spouse. Even though some 500 officers were assigned to that district, we thought that the "the very notion of a 'commander' would suggest to a reasonable person that the spouse has an interest in the courtroom testimony of the persons he commands...that might be substantially affected by the outcome of proceedings before the judge."

We think this state of affairs is even more compelling in the case of Corporation Counsel and his relation to the attorneys serving under him and the outcome of cases for which he is ultimately responsible. The number of attorneys in the Corporation Counsel's office is less than the number of officers in the First District and the relationship of the outcome of those cases to the duties of the Corporation

Counsel more direct than in the case of a commanding officer of a police district to a criminal conviction. Furthermore, it would be unusual for a high-ranking police officer to move into a corresponding field in the private sector, while a Corporation Counsel might well be anticipating a future relationship with a private law firm or a corporate position where the overall performance of the office which he is now heading could be a factor in those employment prospects.

C.

Third, we consider whether Corporation Counsel should be considered as "acting as a lawyer in the proceeding" where the District is a party under Canon E(l)(d)(ii). The commentary to that subsection notes that "[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge." However, even though a number of layers of responsibility may exist between Corporation Counsel and the attorney actually appearing before the judge, nonetheless the regular practice, as we

understand it, is for the name of Corporation Counsel to appear on all court filings. Furthermore, Corporation Counsel, under the statutory sections quoted above, not only bears responsibility but has ultimate "direction and control" of the attorney acting for the District.

The relevance of the concept of supervisory power and responsibility also factored into our Advisory Opinion No. 6. There we were addressing the question whether a judge of the Superior Court must recuse from presiding over criminal matters prosecuted by the Office of the United States Attorney because his spouse was recently hired as an Assistant United States Attorney in that office. We concluded that while the judge should recuse from any proceeding in which the spouse had participated at any stage, recusal was not otherwise ordinarily mandated. We distinguished the situation from that in Advisory Opinion No. 2, noting that none of the considerations derived from the police official's status as a supervisor or command-level employee concerned us, because the Assistant United States Attorney had no such responsibilities in relation to

other prosecutors who might be assigned to the proceedings before the judge.[5]

II.

With the foregoing considerations in mind, we now address the specific questions as phrased by the judge:[6]

1. Question: "Does the fact that a judge's spouse serves as the Corporation Counsel disqualify the judge from handling post-adjudication neglect reviews, where an assistant corporation counsel, six levels removed from the judge's spouse, may appear before the judge? If the spouse's office were able to implement a procedure which relieved the spouse of supervisory responsibility over the neglect reviews handled by the judge, would disqualification still be necessary?"

Answer: The judge here is referring to the neglect reviews that are a specific category of proceedings in the

[5] The importance of command and supervision is also reflected, for example, in the two-year ban on direct government contacts by former government officers with respect to matters under their "official responsibility." 18 U.S.C. § 207(a)(2).

[6] The judge has agreed that a sixth question relating to possible issues that might arise should the spouse leave the position of Corporation Counsel can await that future time and circumstance.

Family Division. See D.C. Code § 16-2323 and D.C. Super. Ct. Negl. R. 22. Consistent with Superior Court policy and practice, she was assigned a neglect review caseload of approximately fifty cases upon her appointment to the court. She advises us: "All active judges of the Superior Court are required to maintain for judicial review a caseload of children who have been adjudicated abused and/or neglected. There are currently over 5,000 neglect reviews on the Superior Court docket and the cases make up a significant portion of each judge's caseload." She further advises: "A neglect review is a post-adjudication matter. They are typically non-adversarial and uncontested and in the majority of the cases no assistant corporation counsel appears."

Notwithstanding the often routine nature of these proceedings, we think they must be considered to fall within the broad category of litigation involving the District and hence the Corporation Counsel. The structure of District law dealing with cases of child neglect mandate

that conclusion. "The District of Columbia shall be a *party* to *all* proceedings under this subchapter [Proceedings Regarding Delinquency, Neglect, or Need of Supervision]." § 16-2305(f). (emphasis added). All neglect petitions are prepared and filed by Corporation Counsel. § 16-2305(c), (d). Corporation Counsel presents evidence in support of petitions and shall "otherwise represent the District of Columbia in all proceedings." § 16-2316(a). The District as a party and Corporation Counsel as its attorney receive notice of all neglect review proceedings, Super. Ct. Negl. R. 22(a). In short, such hearings are an integral part or-the statutory scheme and even if often routine are potentially subject to intense controversy. *See, e.g., In re T.R.J.*, 661 A.2d 1086 (D.C. 1995).

We do not think the six degrees of supervision can be a distinguishing factor. Ultimate responsibility rests with Corporation Counsel. Furthermore, it is not readily apparent to us how, given his statutory responsibility and the extended bases raising disqualification issues as

discussed above, such concerns could be effectively alleviated simply by some internal office procedure. We therefore conclude that, in the first instance, the judge should be prepared to recuse herself from even neglect review cases.

We say "prepared to recuse herself" because it is both possible and feasible for the subsection on "Remittal of Disqualification" to apply in such circumstances. As already indicated, it is the provisions of Canon 3E which form the bases for recusal in the circumstances before us. Canon 3F specifically provides that in such cases,[7] the judge "may disclose on the record the basis for the disqualification [i.e., the position of the judge's spouse as Corporation Counsel] and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification." If "all agree that the

[7] Although it is not entirely clear, it appears that Canon 3F does not authorize the use of this waiver procedure in cases where the ground of recusal is that the judge has "personal bias or prejudice concerning a party" under Canon 3E(I)(a). Advisory Opinion No. 2 makes no suggestion that this provision would be applicable where the spouse is a high-ranking official and we see no reason why it should be a ground for disqualification here simply because the District is a party.

judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding." Canon 3F further provides: "The agreement shall be incorporated in the record of the proceeding," and the comment thereto adds: "As a practical matter, the judge may wish to have all parties and their lawyers sign the remittal agreement," although it also notes that a party may act through counsel "if counsel represents on the record that the party has been consulted and consents."

2. Question: "Is the judge disqualified from all contested criminal cases and civil matters where the District of Columbia is represented by the Office of the Corporation Counsel?"

Answer: Yes, but with the possibility of remittal of disqualification under Canon 3F.

3. Question: "If the Committee concludes that disqualification might be appropriate, is it a disqualification that bars handling of the case unless affirmatively waived by the parties under Canon 3F?"

Answer: Yes, as discussed in connection with question one above, disqualification based solely upon the spouse's position as Corporation Counsel may be waived in accordance with the requirements of Canon 3F. Note that the lawyers as well as the parties (who may, however, act through counsel as specified in the commentary) must agree that the judge should not be disqualified.

4. Question: "Is the spouse's employment a potential problem that must be disclosed on the record at the initial hearing in all such cases for an on-the-record debate pursuant to the Remittal Disqualification procedures of Canon 3F?"

Answer: We assume the "initial hearing" refers to the first time that the judge sits in a particular matter. We note at the outset that the application of Canon 3F is optional with the judge. She may, if she wishes, decide to recuse without seeking such a remittal. We understand, however, that the workload and responsibilities of all the

Superior Court judges with respect to neglect reviews makes the judge reluctant to do so on a blanket basis.

If the judge decides to present the possibility of a Canon 3F remittal, it requires that the judge disclose "on the record the basis of the judge's disqualification." The consideration of agreeing to a waiver of that disqualification, however, is to take place "out of the presence of the judge" and "without participation by the judge." We think that such discussions almost necessarily should be off the record, especially since they may well involve attorney-client discussions. However, the agreement itself, once reached, must be "incorporated in the record of the proceedings," and, if a party acts through counsel, that counsel must "represent[] on the record that the party has been consulted and consents."

5. Question: "Is the spouse's employment merely a potential appearance problem that once disclosed allows the judge to handle the case unless one of the parties requests recusal?"

Answer: No. Canon 3E(l) states that a judge "shall disqualify himself or herself" in the circumstances thereafter listed, which are applicable here. Hence the procedures of Canon 3F must be followed if the judge is not to recuse.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT
OF THE
DISTRICT OF COLUMBIA COURT

ADVISORY OPINION No. 10
(March 28, 2002)

"PRACTICE OF LAW" BY SENIOR JUDGES

The Code of Judicial Conduct contains a partial exemption for senior judges from the rule that otherwise prohibits judges from practicing law. The partial exemption is misleading, however, if read in isolation. In this opinion, the Advisory Committee addresses the issue of the practice of law by senior judges and sets forth a number of significant cautionary considerations under the Code of Judicial Conduct. Our views on this matter were recently transmitted in a report to the Joint Committee on Judicial Administration and are incorporated for wider dissemination into this advisory opinion. As we put it in that report: “[W]e believe that the application of these overarching principles [contained in the Code of Judicial Conduct] impose serious and significant limitations on any such practice.... We deem it highly advisable to alert all senior judges to the potential obstacles in any decision to practice law under the exemption and our present views with respect thereto.”

As background, the present Code of Judicial Conduct was adopted by the Joint Committee on November 7, 1994, with an effective date of June 1, 1995. It establishes standards for ethical conduct of active and senior judges and of magistrate judges in our court system, subject of course to the overarching ultimate authority of the District of Columbia Commission on Judicial Disabilities and Tenure (the "Commission").

As set forth in more detail in its Preface, the Code was "the product of careful deliberations over nearly a four-year period incorporating the views of all judicial officers concerned." The files *of* our Committee, which spearheaded the drafting process, show that the applicability of the Code provisions to senior judges received careful attention. In our limited review, coming within less than a decade later, we accepted the basic overall structure of the statute and Code establishing the structure of senior judge service, including that of "senior judge, inactive." So far as we are aware, that structure has to date by and large worked well and served a basic purpose, as expressed in a commentary in the Application Section D: "The judicial system of the District of Columbia will significantly benefit from the availability of as many active senior judges as possible."

Our report to the Joint Committee was prompted by suggestions emanating from members both of the Joint Committee and of the Commission that a review of the Application section of the Code and the exemptions provided therein for senior judges would be in order as the number of senior judges in both courts continues to rise and experience with the status of such senior judges grows. In particular, we were asked to consider the present exemption of senior judges from Section 4(G), which provides that "a judge shall not practice law," with very limited exceptions (acting pro se and, without compensation, giving legal advice to and drafting or reviewing documents for a member of the judge's family). The Year 2000 Annual Report of the Commission, quoted in the discussion below, further highlighted the relevance of this latter inquiry.

Our attention, therefore, focused upon Application Section C. That section, as recently amended to correct a drafting error, provides:

"C. A senior judge

(1) is not required to comply:
(a)except while serving as a judge, with Section 3(B)(9); and
(b)at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, and 5B(2).

(2) shall not practice law in the court on which the judge serves or in any court or administrative agency subject to the appellant jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a

proceeding in which the judge has served as a judge or in any other proceeding related thereto."

An examination of the exemptions provided for senior judges will demonstrate the normal expectation that senior judges may well engage in a wide range of activities beyond their part-time judicial service, contrary to the limitations on such activities imposed upon full-time judges presumably to avoid drains on their time and energy and to minimize possibilities of conflict of interest. Seniors judges thus may, generally speaking, be active in business enterprises, serve in other governmental capacities, act as fiduciaries, and serve as arbitrators and mediators. Also included in the list of exempted limitations is that prohibiting a full-time judge from the practice of law.

As already mentioned, questions have been raised as to the scope and application of this last-mentioned exemption. Notably, the Year 2000 Annual Report of the District of Columbia Commission on Judicial Disabilities and Tenure sets forth the following as part of the report:

"V. AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

> "During the fiscal year the Commission received a request from a senior judge to assume inactive status, for the purpose of commencing the practice of law. The Commission took the matter under advisement, and had several discussions with the judge concerning the scope of the practice. After a thorough review of the

> provisions of the Code concerning the activities of seniors judges, the Commission concluded that the Code as adopted by the Joint Committee on Judicial Administration for the District of Columbia Courts, does allow inactive senior judges to practice law, with the only prohibition being the practice of law before the Court on which the senior judge serves. The Commission advised the senior judge of its determination, and required certain measures be undertaken to ensure that the practice would be consistent with provisions of the Code, particularly Canon 2B, which prohibits a judge from lending the prestige of judicial office to advance his or her private interests or the private interests of others.
>
> "After much thought and discussion, the Commission is unsettled by the appearance and the fact that senior judges can practice law as provided in the present Code. As a result, a subcommittee of the Commission met with Chief Judge Annice Wagner and members of the Joint Committee to discuss the Commission's concerns, and possible amendments to the Code to restrict and redefine the scope and extent to which senior judges can engage in the practice of law."

Looking back to the history of the adoption of the current exemption in 1995, the Advisory Committee's February 9, 1994 memorandum mentioned above discussed the retention of this exemption as follows:

> "[A]pplication C(I)(b) of the Code generally would exempt senior judges from Canon 4G, which bars judges from practicing law (except pro se and for the judge's family), whereas in limitation of that exemption Application C(2) says a senior judge shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves. We have added to Application C(2) a prohibition against practicing law in any administrative agency subject to the appellate jurisdiction of the court on which the senior judge serves. Taken together, Applications C(l) and C(2) (as amended) would permit a senior judge to practice law, for example, in Maryland and Virginia and in the federal courts of the District of Columbia, Maryland, and

Virginia, during a period when that judge is eligible to sit as a senior judge in the District of Columbia court system. These exemptions reflect the approach of Compliance A(l) & (2) of the 1972 Code now in effect."

The Advisory Committee then included this cautionary note:

"Obviously, a senior judge would have to use good judgment if he or she chooses to practice law in another jurisdiction (including the D.C. federal courts) during a period that comes close in time to periods of service as a judge in this jurisdiction. Conceivably, there may be an "appearance of impropriety" that could be troublesome even though the senior judge literally complies with the rules discussed above. Perhaps Advisory Opinion No. 3 (June 25, 1992), "When Senior Judges May Act as Arbitrators," issued by the Advisory Committee on Judicial Conduct of the District of Columbia Courts, will provide some guidance by analogy. In any event, despite obvious concerns, we see no reason to recommend reversal of a judicial ethics policy about retired or senior judges practicing law that currently is in effect under the 1972 Code and continues under the 1990 code. Difficult questions can be addressed, when necessary, through written opinions of the Advisory Committee."

In retrospect, we think the Advisory Committee's discussion may significantly understate the problems and difficulties in the application of the exemption in our jurisdiction. Unlike the other activities permitted for senior judges, the practice of law by an individual necessarily reflecting a partisan role in the legal world has the potential to clash against the image of the judge as an impartial decision-maker in the application of the law. While the Code through the exemption does not impose

a blanket prohibition against the practice of law by senior judges, they nonetheless continue to be governed by other overarching provisions of the Code, including:

"Canon 2: A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities" and its subtexts A and B:

"A. A judge...shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"B....A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge conveyor permit others to convey the impression that they are in a special position to influence the judge...."

Canon 3: A judge shall perform the duties of judicial office impartially and diligently" and its subtext E(l):

"E(l): A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..."

"Canon 4: A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations" with its subtext A:

"A. Extra-judicial Activities in General: A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties."

It is, therefore, a serious error for a senior judge simply to take note of the exemption and its terms and proceed to engage in the practice of law. On the contrary we believe

that the application of these overarching principles imposes serious and significant limitations on any such practice. Given the long-standing existence of the exemption in the ABA Model Code and the recognition of the part-time status of senior judges, we are not prepared at this point to recommend a blanket abolishment of the exemption. We do, however, deem it highly advisable to alert all senior judges to the potential obstacles in any decision to practice law under the exemption and our present views with respect thereto. As we now view it, the most critical considerations would appear to be, in the main, the geographical location of the proposed practice, its nature, and the timing in relation to periods of actual judicial service.

For example, if the practice of law took place in a geographical area removed from the greater Washington metropolitan area (such as in a Florida retirement community) or if the practice consisted exclusively of legal work in a field totally divorced from those adjudicated by our court system (such as patent law), it is possible that no conflict with the general principles would arise in the ordinary course of events. Likewise, if the practice took place only during an extended period where the senior judge had expressly taken inactive status under

Application Section D, risk of problems would be reduced. However, as the nature of the legal practice relates to a geographical area more proximate to our court system and/or to types of law that are adjudicated therein, the possibilities of conflict can be seen to increase markedly.

Indeed, an arrangement whereby a senior judge who has not taken inactive status handles legal matters anywhere in the greater metropolitan area in a field adjudicated in our courts might raise issues of compatibility with our ethical code. The practice of law in the District and the nearby metropolitan areas of Maryland and Virginia interact in a significant way as to clients and participants. A senior judge still must be perceived as a judge, first and foremost, throughout this relatively restricted region by his or her colleagues at the bar. To deal with a senior judge on one instance as opposing counsel and on another as an impartial adjudicator would raise questions of appearance.

Even in the obviously less sensitive area of a senior judge serving as a mediator or arbitrator, a role similar to that of a judge, the Advisory Committee discussed at considerable length in its Advisory Opinion No. 3, alluded to above, the propriety of senior judges sitting in such a capacity and various factual permutations thereon, such as

whether the arbitration took place in the District or elsewhere, whether the arbitration involved matters which might eventually come before our courts, whether the judge had judicial matters under advisement at the time of serving as an arbitrator, and whether the judge had sat as a judge during the same week or month that he or she acts as a private arbitrator. The considerations discussed in that advisory opinion are plainly applicable in a heightened degree to senior judges engaged in the practice of law. In particular, we note the desirability of significant temporal segregation of an individual's role as a sitting judge and as a practicing attorney, such as concentrating the period of judicial service into a discrete period of the year, and this even in cases where the practice of law takes place apart from the Washington area or in fields exclusively federal.

We hasten to add, however, that we do not think problems in this regard can or should be met by indiscriminate resort to the status of "senior judge, inactive." As the commentary to Application D makes clear, that special status is intended to be reserved only for an opportunity to "embark on alternative career or activity explorations" and is hardly intended to become part of the woof and warp of ordinary senior status. And

as the experience with the Commission set forth in its annual report indicates, even then great care must be taken to develop a structure for the practice of law compatible with the status of "inactive senior judge" and the prospect of future judicial service.

Finally, we make note of a matter that is not within the Committee's jurisdiction but that may bear upon the subject we are addressing. The District of Columbia Court of Appeals in the exercise of its statutory and inherent authority has promulgated rules relating to the District of Columbia Bar and to the unauthorized practice of law. *See Brookens* v. *Committee on Unauthorized Practice of Law,* 538 A.2d 1120, 1125-26 (D.C. 1988); D.C. Bar Rules Preamble. In pertinent part, D.C. App. R. 49(a) provides that "[n]o person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an *active* member of the District of Columbia Bar, except as otherwise permitted by these Rules." D.C. Bar R. ll, § 4 in turn provides as follows:

> *Classes of membership:* The members of the District of Columbia Bar shall be divided into 3 classes known respectively as "active" members, and "inactive" members....Judges of courts of record, full-time court commissioners, U.S. bankruptcy judges, U.S. magistrate judges, other persons who

> perform a judicial function on an exclusive basis, in an official capacity created by federal or state statute or by administrative agency rule, *and retired judges* who *are eligible for temporary judicial assignment,* and *are not engaged* in *the practice of law,* shall be classified as judicial members, except that if a member's terms and conditions of employment require that he or she be eligible to practice law, then the member may choose to be an active member. Any inactive member in good standing and any judicial member who is no longer a judge may change his classification to that ***of*** an active member by filing with the Secretary of the Bar a written request for transfer to the class ***of*** active members, and by paying the dues ***of*** active members. A judicial member who is no longer a judge shall be classified as an active member if he engages in the practice of law in the District of Columbia. No judicial or inactive member shall be entitled to practice law in the District of Columbia or to hold office or vote in any election or other business conducted by the District of Columbia Bar.

It is clear that anyone who practices law in the District of Columbia for which District of Columbia bar membership is required must be an "active" member of the Bar. What is not entirely clear, perhaps, is whether a "retired judge who is eligible for temporary judicial assignment" *must* be classified as a judicial member or whether such a judge has the option to enroll as an active member if the judge wishes to "engage in the practice of law." Any clarification would be within the purview of the Court of Appeals, but it obviously would be desirable that bar membership provisions be consistent with the Code of Judicial Conduct. In any event, D.C. Bar R. II, § 4, would

not be completely determinative, since it would not apply to the practice of law in other jurisdictions nor, perhaps, to those numerous categories of practice in the District for which active membership in the District of Columbia Bar is not required under D.C. App. R. 49(c).

We express the foregoing considerations to alert both present senior judges and those considering a move to that status to the complexities behind the application of the exemption. Beyond that, we are reluctant at this point to attempt to deal with all the various permutations of the practice of law by senior judges and the limitations that the Code may place upon that activity. Our experience with actual cases is limited indeed; to the best of our knowledge, it is rare that our senior judges engage in the practice of law of any kind. At least for the time being, we suggest, in the common-law tradition, each instance presenting potential conflict should be addressed on its facts. To repeat, the principal consideration that should be in the forefront of a senior judge even considering the practice of law as part of his or her nonjudicial activities is that the exemption from the limitation of Canon 4(G) and the continuing restriction on the practice of law in the court on which the judge serves are only the beginning of the inquiry as to precisely how far and under

what circumstances that practice of law can take place in compliance with the Code as a whole.

The court system is enormously benefitted by the willingness of retired judges of this court to serve as senior judges. Appointment and reappointment to that status are, depending upon age, subject to quadrennial or biennial review both by the Commission and by the Chief Judges of our courts. Service as senior judges is optional both with the judge and with the respective Chief Judge; there is no vested right or obligation either way. Careful consideration by all parties involved of the limitations imposed by the Code should, it can be hoped, forestall potential problems posed by an election by a senior judge to practice law in any particular form. The Advisory Committee stands ready to assist to this end.

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

OF THE

DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION NO. 11
(October 29, 2002)

DISQUALIFICATION OF JUDGE BECAUSE OF CHILD'S RECEIPT OF SCHOLARSHIP FROM UNIVERSITY WHICH IS A LITIGANT BEFORE JUDGE

A judge of the Superior Court has requested a formal advisory opinion as a result of her child's award and acceptance of a significant scholarship to a University that, through its related hospital, might be a litigant in cases before the judge. For reasons that follow, we advise that, unless the parties consent after full disclosure, the judge should recuse from any case that involves the child's University. We first set out the facts on which our opinion is based and then consider the relevant ethical considerations.

A.

The judge currently sits on the Probate and Tax Division of the Superior Court. The judge's 17-year old child, while a senior in high school, received offers for admission to seven colleges and universities. Two of them offered full four-year merit scholarships, one valued at $155,000, the other at $145,000. The judge's child decided

to accept the offer of admission and scholarship from one of them ("the donor University") and is now attending that institution.[1]

The judge hears cases in the Probate and Tax Division of the Superior Court. Of relevance to this request for advice, the Division considers adult intervention matters pursuant to the District of Columbia Guardianship, Protective Proceedings and Durable Power of Attorney Act of 1986, D.C. Code § 21-2001, et seq. (2001). Under the act, a court may appoint a conservator and/or guardian for a person found to be incapacitated. The court may also be called upon to make critical decisions concerning an incapacitated person's treatment. Hospitals in the Washington, D.C. area, including a hospital affiliated with the donor University, petition the court with respect to patients in their care. The hospitals are not necessarily "interested parties" in such proceedings as that term is commonly understood, but there are instances in which a hospital participates actively in the proceedings and in which a hospital's own actions vis à vis the patient can

[1] The donor University issued a press release announcing the scholarships awarded to nine high school seniors in the District of Columbia. According to the release, the donor University "selects students based on their class rank, GPA, SAT scores, course of study, teacher recommendations, leadership qualities, community service and other extracurricular activities and achievements. The scholarships are renewed annually provided the recipients meet the University's academic progress standards."

become an issue in the proceedings. The question we have been asked is whether the judge should recuse in cases involving the donor University's Hospital.[2]

B.

We begin by noting that there is no impropriety in the acceptance of the scholarship. The Code of Judicial Conduct expressly provides an exception to the general rule that a judge[3] shall "not...accept, a gift, bequest, favor or loan from anyone," Canon 4D(5), in the case of "a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants," Canon 4D(5)(g).

That a scholarship may be accepted, however, does not mean that its acceptance is without consequence to the judge's adjudicatory responsibilities. The section of the Code permitting scholarships is not limited, as in the case of the section permitting "any other gift, bequest, favor or loan" only to situations where the donor "is not a party or other person who has come or is likely to come or whose

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[2] We note that the donor University, its partly-owned Hospital or other related entity could also come before the judge while sitting in the Probate and Tax Division as a beneficiary of a will, or in a tax-related case, or in a case before another division to which the judge might be assigned. The general principles we discuss in this opinion relating to recusal would apply in those situations as well. See note 7 *infra.*

[3] Judges must "urge members of the judge's family residing in the judge's household" to do likewise. Canon 4D(5).

interests have come or are likely to come before the judge." Canon 4D(5)(h). It therefore appears that the Code does not categorically preclude a judge from presiding over a case in which a litigant or interested party has been the donor of a scholarship to the judge or a member of the judge's family. A commentary to Canon 4D, however, notes that:

> A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required.

A scholarship is not a "gift" in the ordinary sense, but a scholarship to a minor child may be considered an indirect benefit or subsidy to the parent who otherwise would likely be financially responsible for the child's college education. Furthermore, unlike a past completed gift, the scholarship at issue here is in a sense a continuous benefit during its four year duration and thus contemporaneous with any adjudication on which the parent judge might sit during that period. Therefore, even though not every scholarship may necessarily require disqualification in cases involving the donor, the caution in the commentary applies here in light of the substantial

monetary value of the scholarship and its competitive selection process.[4] Thus, we turn to consider whether, and on what terms, disqualification may be required.

Canon 3E provides:

1) A judge shall disqualify himself or herself in a proceeding in which the Judge's impartiality might reasonably be questioned…

Although receipt of a scholarship is not one of the enumerated instances requiring disqualification, "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in section 3E(I) apply." Commentary to Canon 3E(1). Moreover, "this [Canon 3] is to be read in connection with Canon 2, which states '[a] judge should avoid impropriety and the appearance of impropriety in all activities." Committee on Codes of Conduct, Advisory Opinion No. 27, October 29, 1973 (Revised July 10, 1998). Specifically, Canon 2A provides that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." As the commentary to Canon 2A notes, "[t]he test for appearances

[4] We distinguish this scholarship from a generally available benefit, tax credit or deduction, where the judge would not be viewed as having the same kind of gratitude toward the donor University of a scholarship awarded to only a few students as a result of a competitive process.

of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." As Justice Frankfurter put it, "[t]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 467 (1952).

The standard we apply is whether "from the perspective of 'the average person,' a fully informed person might reasonably question whether the judge 'could decide the case with the requisite aloofness and disinterest.'" *Scott* v. *United States*, 559 A.2d 745,750 (D.C. 1989) (en banc) (quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985) (holding that trial judge violated Canon 3C(l) by presiding over criminal trial in which the U.S. Attorney's Office was prosecutor while judge was concurrently negotiating employment with U.S. Department of Justice). We think that a litigant or other person affected by litigation involving the donor of a substantial scholarship to the judge's minor child might reasonably perceive that the judge's impartiality could be impaired by a feeling of gratitude to the donor for the award, or desire for continuation of the scholarship during the whole of the student's college

education - the "specter of partiality that the Canon and the Supreme Court entreat all judges scrupulously to avoid." *Id.* Therefore, the judge is disqualified from proceedings involving the donor University and its Hospital.[5] Because disqualification is based on the appearance of impropriety, and not personal bias, the disqualification is subject to remittal after disclosure to the parties pursuant to Canon 3F, a discretionary option open to the judge. *See* D.C. Courts' Advisory Committee on Judicial Conduct, Advisory Opinion No. 9 (May 3, 2001). Upon disclosure, the parties would be able to evaluate on a case-by-case basis whether the donor's interest in a particular case is such as to warrant excluding the judge from participating in the proceeding.

[5] According to the donor University Hospital's website, since 1997 the Hospital "has been jointly owned and operated by a partnership" between the donor University and another entity. In light of the significant interest of the donor University in the Hospital, we consider that the Hospital and the donor University are the same for purposes of this opinion.